District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **JAMES HOLMES,** Defendant	σ COURT USE ONLY σ
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. **12CR1522** Division 26
MOTION TO PREVENT DEATH QUALIFICATION OF THE JURY [D-150]	

CERTIFICATE OF CONFERRAL

The prosecution states that they object, and will file a responsive pleading to this motion.

Mr. Holmes, through counsel, moves this Court to prevent death qualification of the jury in this case on the basis that it violates his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article II, sections 3, 16, 20 and 25 of the Colorado Constitution. In support of this motion, he states the following:

1. The United States Supreme Court, as well as lower courts across this country, have spent the last 40 years tinkering with what Justice Blackmun called "the machinery of death." *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of certiorari). This struggle has focused on how to ensure individualized sentencing for the capital accused while concurrently limiting the potential for arbitrariness to infect the sentencing decision.

2. We have now learned through ground-breaking social science research that the theories underlying the current death machinery with regard to the sentencing jurors do not actually manifest in reality. The Capital Jury Project research described in detail in Motion D-149 demonstrates that under the current scheme, there are no guarantees that any death sentence is constitutional. This is in large part due to the death-qualification of the jurors. Based on these new findings, it is clear that it is no longer a question of if this death machinery will fall, but rather only a question of when.

3. Mr. Holmes maintains all arguments set forth in his concurrently filed Motion to Declare the Death Penalty Unconstitutional for its Failure, in Practice, to Meet the Minimum Constitutional Requirements Set Forth in *Furman, Gregg* and Their Progeny [D-149]. Should

this Court deny that motion, Mr. Holmes, through counsel and pursuant to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article II, sections 16, 20 & 25 of the Colorado Constitution, moves this Court to order at least one of the following alternatives in attempts to remedy the constitutional infirmities rendered through the death qualification process.[1] In support of this motion, Mr. Holmes states the following:

BACKGROUND

4. Mr. Holmes is charged with first degree murder of twelve people. The prosecution seeks the death penalty as punishment.

5. Social science research has shown that death qualification produces juries that are both partial to the prosecution and prone to convict. Additionally, recent studies have shown that those prone to convict are also likely to reach a premature decision that a death sentence should be imposed. Further, the death qualification process itself strongly influences potential jurors to become predisposed in ways that are prejudicial to the rights and interests of capital defendants, making such juries less than neutral on the issue of guilt/innocence and sentencing. *See* Motion to Declare the Death Penalty Unconstitutional for its Failure, in Practice, to Meet the Minimum Constitutional Requirements Set Forth in *Furman, Gregg* and Their Progeny [D-149], and authorities cited therein. *See also* Butler & Moran, *The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 2 J. Law & Human Behav. 26 (April 2002), Attached as Exhibit A; *see also* Associate Justice John Paul Stevens, Speech before the American Bar Association's Thurgood Marshall Awards Dinner, Aug. 6, 2005, available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-06-05.html ("Two aspects of the process of selecting juries in capital cases are troublesome. In case after case many days are spent conducting voir dire examinations in which prosecutors engage in prolonged questioning to determine whether the venire person has moral or religious scruples that would impair her ability to impose the death penalty. Preoccupation with that issue creates an atmosphere in which jurors are likely to assume that their primary task is to determine the penalty for a presumptively guilty defendant. More significantly, because the prosecutor can challenge jurors with qualms about the death penalty, the process creates a risk that a fair cross-section of the community will not be represented on the jury.").

6. Death qualification has several distinct effects that impair the ability of the jury to fulfill its function as a fair and impartial representative of the community. The combined impact of these effects makes death qualification unconstitutional under both the United States and Colorado Constitutions. *See* Butler & Moran, *supra*; *see also* Allen, Mabry, & McKelton, *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 6 J. Law & Human Behav. 22 (Dec. 1998), Attached as Exhibit B.

7. In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Supreme Court rejected the argument that death qualification violates the Sixth Amendment's requirement that a jury be selected from a fair cross section of the community. The Court also rejected the claim that the conviction-prone jury which results from the death qualification process violates the Sixth Amendment right to an impartial jury.

8. Significantly, the Court in *Lockhart* specifically addressed only the issue that death-qualified jurors were more likely to *convict* and the Court did not address any concerns

[1] 'Death qualifying' the jury, as it is referred to in this motion, is act of removing from the venire prospective jurors who state during voir dire that they are unable to vote for the imposition of the death penalty. *See Lockhart v. McCree*, 476 U.S. 162, 166-67 (1986).

related to a death qualified-jury and capital *sentencing*. In rejecting McCree's Sixth Amendment argument, the Court noted:

> [B]oth *Witherspoon* and *Adams* dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the possible effects of an "imbalanced" jury. As we emphasized in *Witherspoon:*
>
> > "[I]n Illinois, as in other States, the jury is given broad discretion to decide whether or not death *is* 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision.
> >
> > ".... Guided by neither rule nor standard, 'free to select or reject as it [sees] fit,' a jury that must choose between life imprisonment and capital punishment can do little more-and must do nothing less-than express the conscience of the community on the ultimate question of life or death." 391 U.S., at 519, 88 S.Ct., at 1775 (emphasis in original; footnotes omitted).
>
> Because capital sentencing under the Illinois statute involved such an exercise of essentially unfettered discretion, we held that the State violated the Constitution when it "crossed the line of neutrality" and "produced a jury uncommonly willing to condemn a man to die." *Id.,* at 520-521, 88 S.Ct., at 1776.
>
> In *Adams,* we applied the same basic reasoning to the Texas capital sentencing scheme, which, although purporting to limit the jury's role to answering several "factual" questions, in reality vested the jury with considerable discretion over the punishment to be imposed on the defendant. See 448 U.S., at 46, 100 S.Ct., at 2527 ("This process is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths"); *cf. Jurek v. Texas,* 428 U.S. 262, 273, 96 S.Ct. 2950, 2957, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) ("Texas law essentially requires that ... in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it"). Again, as in *Witherspoon,* the discretionary nature of the jury's task led us to conclude that the State could not "exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty." *Adams,* 448 U.S., at 50, 100 S.Ct., at 2529.

> In the case at bar, by contrast, we deal not with capital sentencing, but with the jury's more traditional role of finding the facts and determining the guilt or innocence of a criminal defendant, where jury discretion is more channeled. We reject McCree's suggestion that *Witherspoon* and *Adams* have broad applicability outside the special context of capital sentencing, and conclude that those two decisions do not support the result reached by the Eighth Circuit here.
>
> *Lockhart v. McCree*, 476 U.S. 162, 182-183 (1986) (footnote omitted).

9. Thus, in *Lockhart*, the Court was not addressing or considering how death qualification of a capital jury might impact the defendant's rights to a fair and impartial jury at *sentencing*, nor did it address any Eighth Amendment or due process concerns related to the death qualification process and its impact on a capital sentencing proceeding.

10. Recent social science studies since the decision in *Lockhart* demonstrate that death-qualified jurors are likely to engage in premature determinations that the death penalty is an appropriate sentence in a given case and to base their decision for a death sentence on improper considerations. *See, e.g.,* Butler & Moran, *supra*

11. The Capital Jury Project (hereinafter CJP) was created in 1990, with funding from the Law and Social Sciences Program of the National Science Foundation (grant NSF SES-9013252). The Capital Jury Project (hereinafter CJP) was created in 1990, with funding from the Law and Social Sciences Program of the National Science Foundation (grant NSF SES-9013252) that was extended in 2006. It is a national program of research on the decision-making of capital jurors conducted by a consortium of university-based researchers.

12. To date, interviews have been completed with 1198 jurors from 353 capital trials in 14 states. These states were chosen for this research to reflect the principal variations in guided discretion capital statutes. Within each state, 20 to 30 capital trials were picked to represent both life and death sentencing outcomes. From each trial, a target sample of jurors was systematically selected for in-depth three-plus hour personal interviews. Since 1993, some 45 articles presenting and discussing the findings of the CJP have been published in scholarly journals. *See* Motion to Declare the Death Penalty Unconstitutional for its Failure, in Practice, to Meet the Minimum Constitutional Requirements Set Forth in *Furman, Gregg* and Their Progeny [D-149], and authorities cited therein.[2]

13. The research of the capital jury project found that those jurors who actually served on capital juries were in fact biased toward *imposing* the death penalty in several ways. The evidence established that nearly one half (49.2%) of all capital jurors make their sentencing decision before the penalty phase of the trial even begins; that they feel strongly about their decision; and that they do not waver from it over the course of the trial. Premature decision-

[2] Mr. Holmes hereby incorporates into this motion all of the arguments and authorities contained in D-149, as well as the exhibits submitted in conjunction with that motion.

making was present in every state studied by the CJP. The CJP data establishes that 97.4% of all early pro-death jurors "felt strongly about their early pro-death stance," with 70.4% indicting they were "absolutely convinced" and 27% indicating they were "pretty sure" about their decision. *See* [D-149], and authorities cited therein.

14. The death qualification process of capital jury selection, itself, produces the worst possible group of jurors precisely when a criminal defendant should have a right to the most qualified jurors. The studies demonstrate that the process negatively impacts the capital trial in several ways.

15. First, by questioning potential jurors extensively about their attitudes towards the death penalty, substantial numbers of jurors believe both that the defendant must be guilty, and that apparently they are going to be asked to sentence him to death. Many jurors believe that the sub-text of a capital trial *voir dire* is not about whether the defendant committed the murder, it is about what punishment he should receive. Moreover, many jurors, after seeing which jurors stay and which leave, believe that if selected, it is understood that they will find the defendant guilty, and that they will sentence him or her to death.

16. In addition to the bias towards guilty verdicts and death sentences, death-qualifying *voir dire* results in the least representative jury criminal defendants face. Early studies which have been validated by the CJP established rather obvious phenomena. People's attitudes towards capital punishment do not exist in a vacuum. One's attitudes about this very controversial topic, over which Americans have very divergent views, are strongly associated with a whole constellation of attitudes about the criminal justice system. These studies established, for instance, that people who support the death penalty – and who not only support it, but are able to tell the lawyers and the judge in the courtroom that they would be able to impose it – hold a number of other views about the criminal justice system that work strongly against the capital defendant.

17. The data demonstrates that these jurors, much more strongly than non-death-qualified jurors, believe that if a defendant does not testify in his or her own defense, that the failure to do so is affirmative proof of guilt. Death-qualified jurors do not believe in the presumption of innocence. They believe much more strongly that "where there is smoke, there is fire." They are extremely distrustful of defense lawyers and view everything they have to say with a great deal of skepticism. On the other hand, they are extremely receptive to the prosecution and its witnesses – especially police officers – and believe them.

18. They do not believe in Due Process guarantees, such as requiring the prosecution to bear the burden of proof beyond a reasonable doubt. They are highly suspicious of experts called by the defense. In short, death-qualified jurors are the jurors least representative of the community as a whole, and are the jurors least likely to give a criminal defendant the benefit of the doubt or a fair sentencing hearing and determination.

19. The bias in capital sentencing existent in death-qualified juries that is demonstrated by the CJP data was not an issue that was considered or addressed by the Court in *Lockhart*. Such resulting sentencing bias violates Mr. Holmes' rights to due process of law and against cruel and unusual punishment under the state and federal constitutions. Further, since the

time of *Lockhart*, it has been determined that a capital defendant has a constitutional right under the Sixth Amendment to have any facts necessary to render him death-eligible found by a jury beyond a reasonable doubt. *See Ring v. Arizona*, 536 U.S. 584 (2002). The death qualification process deprives Mr. Holmes of a fair and impartial jury to determine death-eligibility.

20. Another factor not considered by *Lockhart*, is the fact that death-qualified juries are also more prone to reject evidence of insanity in cases involving nonorganic disorders such as schizophrenia. *See* Ellsworth, Bukaty, Cowan and Thompson, *The Death-Qualified Jury and the Defense of Insanity,* 8 Law and Human Behavior 81 (1984) ("[B]etween 80% and 90% of the death-qualified subjects reject the insanity defense for the schizophrenics."), attached as Exhibit C. As noted by Ellsworth, et. al., "[p]ro-death-penalty jurors have been much more likely than anti-death-penalty jurors to regard the insanity defense as a ruse and an impediment to the conviction of criminals." *Id.* at 90. Not only does this "clearly reflect their mistrust of the concept of a *mental* disorder as an excusing condition" but it may also reflect a belief that mental illness is "simply another manifestation of a weak or corrupted character." *Id.*

21. Death-qualified jurors are also "more likely to endorse certain insanity myths." Butler and Wasserman, *The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense,* 36 Journal of Applied Social Psychology 7, pp. 1744-1757 (2006), attached as Exhibit D. These myths are "that the insanity defense is used on a frequent basis, that the insanity defense is a 'legal loophole,' and that if a person if found NGRI, he or she is released immediately back into society." *Id.* at 1752.

22. Not only does this research regarding death-qualified jurors' views of insanity defenses have serious implications regarding Mr. Holmes's right to a fair and impartial jury in the merits phase of this case, but it also has serious implications for any potential penalty phase, given that these same death-qualified jurors would, in the event of a conviction in this case, also be asked to consider both statutory and non-statutory mitigation that bears upon mental illness. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (to satisfy federal and state constitutional standards, "[t]he sentencer must also be able to consider and give effect to [mitigation] evidence in imposing sentence."); *Skipper v. South Carolina*, 476 U.S. 1 (1986) ("Evidentiary ruling excluding relevant mitigating evidence of defendant's adjustment to prison setting violates *Eddings*); *Mills v. Maryland*, 486 U.S. 367 (1988) (Requirement of unanimous jury finding on mitigating factors created unconstitutional barrier to consideration of relevant mitigating evidence).

23. In addition, the Supreme Court in *Lockhart* did not address or resolve the following claims which Mr. Holmes raises on both federal and state constitutional grounds:

a. Death qualification denies Mr. Holmes his due process right to a fair trial because of the skewing of the jury and its conviction prone composition.

b. Death qualification denies Mr. Holmes equal protection of the law because only accused people facing the death penalty are forced to go to trial before conviction-prone juries. The distinction between accused people facing the death penalty and all other accused people is totally irrational and unjustifiable.

c. Death qualification violates the cruel and unusual punishment clauses of the United States and Colorado Constitutions because, unlike any other accused, an accused facing the death penalty is required to have the issue of his or her guilt determined by a jury specifically skewed to make a conviction more likely. A conviction for first-degree murder is an essential step in the State's effort to execute the accused.

d. Death qualification denies Mr. Holmes equal protection of the law because it excludes minorities and women disproportionately.

e. Death qualification denies Mr. Holmes his right to be free from Cruel and Unusual Punishment under the Colorado and United States Constitutions because it deprives him of the ability to show that evolving standards of decency as reflected in the community at large no longer tolerate the government deliberately taking the life of an individual when life without parole is an available penalty, especially when as here the odds of an individual convicted of first degree murder in Colorado having the death penalty sought against him, let alone having it imposed are exceedingly rare.

24. Additionally, trial on the charge and penalty phase before the same jury renders it impossible for the jury to consider only the statutory aggravating factors set forth in § 18-1.3-1201(5), in its determinations of whether any statutory aggravating factors have been proven beyond a reasonable doubt and whether it has proven beyond a reasonable doubt that mitigation does not outweigh those statutory aggravating factors and whether, based on those factors, the only appropriate penalty is death. This is because evidence of aggravating and prejudicial facts which would not be admissible or relevant at the penalty phase of the trial can be admitted as relevant evidence at the merits phase of the trial and because cautionary and limiting instructions cannot cure any prejudice in a capital case.

25. Trial of the merits and penalty phases before the same jury also confronts defense counsel with hopeless dilemmas, requiring the defense to make strategy decisions which hurt them at one phase of the trial, but may help them at the other stage of the trial.

26. Consequently, Mr. Holmes moves this Court to adopt at least one of the following alternatives to remedy the real life impact of death qualification in this case:[3]

a. Prevent any death qualification of the jury in this case and in fact mandate life qualification. In this scenario, those jurors who would be excludable under the *Witherspoon* and *Witt* rulings would be eligible to sit on the jury to ensure a fair cross-section of venire and eliminate the biases inherent, at both the merits phase and the sentencing, in juries that exclude this population. Additionally, those jurors who would automatically vote for the death penalty would be removed for cause as mandatory death sentences are *per se* unconstitutional. *See Woodson v. North Carolina*, 428 U.S. 280 (1976).

[3] These alternative are suggested in the order of preference as Mr. Holmes believes that the further down the list we go, the less constitutional the process because under both the United States and Colorado Constitutions.

b. Empanel two juries, should a penalty phase become necessary. In this scenario, the Court would first empanel a non-death qualified jury to hear the trial on the merits and deliberate and render a verdict. Should this jury convict Mr. Holmes on any death-eligible charge, a second jury panel would then be chosen to hear and render a verdict in the penalty phase. This would eliminate the merits phase biases inherent in death qualified juries and ensure a fair and impartial verdict on the merits of the charges as well as the issue of insanity. It would also avoid the unconstitutional infirmities discussed above in paragraphs 23 and 24 that stem from the same merits phase jury also rendering a verdict in the penalty phase. The process to empanel the merits phase jury could occur as follows:

   i. The Court should prevent questioning at the trial on the merits phase as to how a prospective juror would vote at a possible penalty phase or any similar inquiry into death penalty views.
   ii. In the event the Court believes that some death qualification must be allowed to identify those jurors who could not be fair and impartial on the issue of guilt or innocence due to death penalty attitudes, questioning should be done individually and sequestered as this Court has already ordered.
   iii. The Court should not allow jurors to be excused at the trial on the charge solely because they would be unwilling or impaired in considering voting for death at a possible penalty phase.

   The process to empanel the penalty phase jury should one become necessary could also occur in several ways:

   iv. The Court should life qualify and not death qualify this panel as described in paragraph a above.
   v. In the event the court believes that life qualification is unconstitutional, the Court can impose death qualification with regards to this panel.

c. Empanel two juries at the outset of the case. One jury would be non-death qualified and the second jury would be death-qualified. While both juries would hear the merits phase of the case, only the non-death qualified jury would render a verdict at that stage. Should that non-death qualified jury convict Mr. Holmes on any death-eligible charge, the second, death-qualified jury, having heard the evidence in the merits phase, would go on to hear and render a verdict in the penalty phase. This scenario would ensure a fair and impartial verdict in the merits phase under both the United States and Colorado Constitutions.

Request for a Hearing

27. Mr. Holmes moves for an evidentiary hearing on this motion.

Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.

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Dated: August 30, 2013

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **JAMES HOLMES,** Defendant	σ COURT USE ONLY σ
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. **12CR1522** Division 26
ORDER RE: MOTION TO PREVENT DEATH QUALIFICATION OF THE JURY [D-150]	

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ _____

JUDGE Dated

I hereby certify that on August 30, 2013, I

____ mailed, via the United States Mail,
____ faxed, or
__✓__ hand-delivered

a true and correct copy of the above and foregoing document to:

George Brauchler
Jacob Edson
Rich Orman
Karen Pearson
Office of the District Attorney
6450 S. Revere Parkway
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Fax: 720-874-8501

D-150

Exh. A

Law and Human Behavior, Vol. 26, No. 2, April 2002 (© 2002)

The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials

Brooke M. Butler[1,2] **and Gary Moran**[1]

Previous research has found that death qualification impacts jurors' receptiveness to aggravating and mitigating circumstances (e.g., J. Luginbuhl & K. Middendorf, 1988). However, the purpose of this study was to investigate whether death qualification affects jurors' endorsements of aggravating and mitigating circumstances when Witt, *rather than* Witherspoon, *is the legal standard for death qualification. Four hundred and fifty venirepersons from the 11th Judicial Circuit in Miami, Florida completed a booklet of stimulus materials that contained the following: two death qualification questions; a case scenario that included a summary of the guilt and penalty phases of a capital case; a 26-item measure that required participants to endorse aggravators, nonstatutory mitigators, and statutory mitigators on a 6-point Likert scale; and standard demographic questions. Results indicated that death-qualified venirepersons, when compared to excludables, were more likely to endorse aggravating circumstances. Excludable participants, when compared to death-qualified venirepersons, were more likely to endorse nonstatutory mitigators. There was no significant difference between death-qualified and excludable venirepersons with respect to their endorsement of 6 out of 7 statutory mitigators. It would appear that the* Gregg v. Georgia *(1976) decision to declare the death penalty unconstitutional is frustrated by the* Lockhart v. McCree *(1986) affirmation of death qualification.*

INTRODUCTION

In the United States, the jury has a central role in capital (or death penalty) trials. In all but a few states that retain capital punishment, the jury has the primary responsibility of pronouncing either a death or life sentence. A primary difference between capital jurors and jurors in other cases is that death penalty jurors must undergo an extremely controversial process called death qualification.

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Death qualification is a part of voir dire that is unique to capital trials. During death qualification, prospective jurors are questioned regarding their beliefs about capital punishment. This process serves to eliminate jurors whose attitudes toward the death penalty would render them unable to be fair and impartial in deciding the fate of a defendant. In order to sit on a capital jury, a person must be willing to consider all legal penalties as appropriate forms of punishment. Jurors who "pass" the aforementioned standard are deemed "death qualified" and are eligible for capital jury service; jurors who "fail" the aforementioned standard are deemed "excludable" or "scrupled" and are barred from hearing a death penalty case.

Two United States Supreme Court cases are pivotal in defining the standards for death-qualified and excludable jurors. In *Witherspoon v. Illinois* (1968), the Court ruled that death qualification could exclude any venireperson who would decide the guilt or penalty or both without regard to the evidence. A major change in the standard for death qualification occurred in *Wainwright v. Witt* (1985). According to this ruling, in the opinion of the judge, if a potential juror feels so strongly about the death penalty that [his/her] belief would "prevent or substantially impair the performance of his duties as a juror, it is grounds for dismissal for cause" (p. 852).

Opposition to the death penalty, however defined, is more frequent in certain demographic and attitudinal subgroups than others (Dillehay & Sandys, 1996; Fitzgerald & Ellsworth, 1984). This results in juries that are anticivil libertarian in nature, especially regarding such critical trial issues as presumption of innocence and burden of proof (Fitzgerald & Ellsworth, 1984; Moran & Comfort, 1986; Thompson, Cowan, Ellsworth, & Harrington, 1984).

In addition, Haney (1984a, 1984b) argues that the experience of death qualification itself affects jurors' perceptions of both the guilt and penalty phases of a death penalty case. Capital voir dire is the only voir dire that requires the penalty to be discussed before it is relevant. Thus, the focus of jurors' attention is drawn away from the presumption of innocence and toward postconviction events. The time and energy spent by the court presents an implication of guilt and suggests to jurors that the penalty is relevant, if not inevitable (Haney, Hurtado, & Vega, 1994).

Perhaps, more importantly, the aforementioned attitudes translate into behavior. Zeisel (1968), Cowan, Thompson, and Ellsworth (1984), and Moran and Comfort (1986) found that, when compared to *Witherspoon* excludables, pro–death-penalty persons were significantly more willing to convict in both mock and real trials. This effect occurred on initial ballots as well as after deliberation.

A final United States Supreme Court case is critical in the discussion of death qualification. In *Lockhart v. McCree* (1986), despite the body of research that suggested that death qualification is prejudicial, the Supreme Court deemed the process constitutional. Although death qualification appears to be moot in law, it is not settled fact. Additional research is warranted concerning the fairness of death qualification.

One such area of research is jurors' perceptions of aggravating and mitigating circumstances. In most states that have capital punishment, the jury is primarily responsible for the sentence. If a conviction occurs in a capital case, the jury then determines the penalty by weighing the aggravating circumstances (i.e., arguments for death) against the mitigating circumstances (i.e., arguments for life). The sentence

that the jury advises must be based on this consideration. In Florida, the judge has the ultimate opinion in capital cases. However, the recommendation of the jury is rarely overturned (Luginbuhl & Middendorf, 1988).

The Supreme Court has ruled in *Lockett v. Ohio* (1978) that aggravating circumstances are limited by statute; mitigating circumstances are not. The vast majority of states that retain capital punishment employ this version of guided discretion. Although each state is unique, the circumstances that may be considered during trial tend to overlap.

In Florida, there are 14 *specific* aggravating circumstances. The judge has the final opinion on which, if any, of the 14 the jury may consider. In contrast, there are seven *examples* of mitigating circumstances. Although the judge also has the final word on which, if any, will be presented to the jury, mitigating circumstances are merely suggestions. In fact, the jury may consider any aspect of the crime or defendant's character in mitigation.

Previous research has found that excludable jurors are more receptive to mitigating than aggravating circumstances (Haney et al., 1994; Luginbuhl & Middendorf, 1988; Robinson, 1993). However, some of these studies utilized the now-defunct *Witherspoon* rule. It is imperative to investigate whether death qualification affects jurors' endorsements of special circumstances when they are categorized under the current *Witt* standard.

In addition, all earlier studies relating to death qualification have asked jurors to classify a list of circumstances as either aggravators or mitigators without including a stimulus case vignette or penalty-phase arguments. We felt providing the aforementioned would serve to both sensitize jurors to their preexisting attitudes as well as enhance the external validity of the research.

The purposes of the current study are twofold: (1) we plan to replicate previous research by investigating the differences between death-qualified and excludable jurors' evaluations of aggravating and mitigating circumstances under the more current *Witt* standard; and (2) we plan to extend previous research through the utilization of a sample and methodology that are both externally valid. Based on the findings of similar studies, it is hypothesized that death-qualified jurors, when compared to *Witt* excludables, will be more likely to endorse aggravating circumstances. It is also predicted that excludables, as opposed to death-qualified jurors, will be more likely to endorse both nonstatutory and statutory mitigating circumstances.

METHOD

Participants

Participants consisted of 450 venirepersons who had been called for jury duty (via a random selection of drivers' license and voters' registration lists) at the Eleventh Judicial Circuit in Miami, Florida. Fifty-nine percent of participants were women; 41% were men. The median age was 41; the median income was $60,000.

The ethnic origin of the sample was as follows: 32% were White/Non-Hispanic; 51% were White/Hispanic; 2% were Black/Hispanic; 10% were Black; and 5% were

of an ethnic origin other than what was specified on the questionnaire. Although a disproportionately large percentage of the sample was Hispanic, it is representative of that population.

One percent of respondents had no high school education; 4% had some high school; 14% had completed high school; 40% had some college or junior college; 27% had a college degree; and 15% had a postgraduate or professional degree. Twenty-seven percent of the jurors had served on a jury before.

Stimulus Case

First, venirepersons read the summary of testimony presented during the guilt phase of a capital trial involving the robbery and murder of a convenience store clerk. The scenario was constructed with the assistance of an attorney experienced in capital cases.

In the scenario, three eyewitnesses saw a man enter the convenience store and demand money from the cashier. When the cashier turned around to open the register, the perpetrator shouted at him to "hurry up." The cashier fumbled with the register, and the perpetrator shot him once, killing him instantly. The perpetrator then took the money out of the register (amounting to $300) and fled. A short time later, the police found a man who matched the description of the murderer walking near the convenience store. The man, Andrew Jones, did not have an alibi for his whereabouts at the time of the crime. They searched him and found $300. The police arrested Mr. Jones and took him to the police station. In a subsequent lineup, the three eyewitnesses positively identified Mr. Jones as the person they had seen kill the convenience store clerk. His fingerprints were also found at the scene of the crime.

Second, venirepersons then read the summary of arguments and testimony presented during the penalty phase of the aforementioned capital trial. The prosecution presented the following aggravating circumstances and urged participants to vote in favor of the death penalty: the murder occurred during the commission of another felony; the defendant has a prior history of violence; the crime was committed while Mr. Jones was on probation; the crime was committed in order to avoid identification and arrest; the victim was murdered for $300; and the crime was committed in a cold, calculated, and premeditated manner.

The defense attorney presented the following mitigating circumstances and urged venirepersons to sentence the defendant to life in prison without the possibility of parole: Andrew Jones was physically abused as a child; Andrew Jones had served in the military; he had a history of alcoholism and using illegal drugs; he was under the influence of extreme mental or emotional disturbance; and Mr. Jones was taking two types of antidepressants when the murder occurred.

In an actual trial, the judge determines which aggravating circumstances the jury will be allowed to consider. In contrast, jurors may consider any aspect of the defendant's character or crime in mitigation. Consequently, it would have been impossible (as well as unrealistic) to include all possible aggravating and mitigating circumstances. Therefore, we randomly selected six aggravators and five mitigators. In addition, we felt that an accurate scenario would simulate capital jurors' experiences more accurately, and, hence, make the results more generalizable.

Predictor Variables

Venirepersons' specified their level of support for the death penalty in two ways. First, participants were asked to circle the statement that they agreed with most: (1) The death penalty is never an appropriate punishment for the crime of first-degree murder; (2) In principle, I am opposed to the death penalty, but I would consider it under certain circumstances; (3) In principle, I favor the death penalty, but I would not consider it under all circumstances; and (4) The only appropriate punishment for the crime of first-degree murder is the death penalty. Venirepersons who answered (2) or (3) to the aforementioned question were classified as death-qualified according to *Witherspoon*; those who answered (1) or (4) were classified as excludable.

Second, venirepersons were asked to indicate if they felt so strongly about the death penalty (either for or against it) that their views would prevent or substantially impair the performance of their duties as a juror in a capital case. Participants who answered "No" to the aforementioned question were classified as death-qualified according to *Witt*; those who answered "Yes" were classified as excludable.

Dependent Measure

Florida Statute 921.141(5) specifies 14 aggravating factors and Florida Statute 921.141(6) suggests 7 mitigating factors that a jury can consider when deciding to sentence a defendant to either death or life in prison without the possibility of parole. Aggravators are limited by statute; mitigators are not. Aggravators are legal justifications for the imposition of the death penalty; mitigators are legal justifications for a life sentence. If the jury finds that aggravating circumstances do exist, they then determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

Twenty-six items were constructed: 14 represented aggravating factors; 5 represented nonstatutory mitigating factors; and 7 represented statutory mitigating factors. Some special circumstances were relevant to the case; others were not. Venirepersons were asked to read each item and indicate their opinion on a 6-point Likert scale, ranging from strong disagreement to strong agreement.

Although participants were told that they could consider anything in mitigation, they were not specifically instructed on the law (i.e., burden of proof, presumption of innocence, bifurcation, decision rules for finding the presence of aggravators/mitigators). We felt that instructions on the aforementioned issues were unnecessary as our focus is not upon verdict or group decision-making processes. Rather, we were primarily interested in individual venirepersons' perceptions of aggravating and mitigating circumstances.

Procedure

Permission to collect data at the courthouse was obtained from the Director of the Jury Pool under the assumption he had the opportunity to review the proposal before the research was undertaken. After the proposal was approved, the experimenter collected data in seven sessions during June–July of 2000. Volunteers were

solicited from an area designated for prospective venirepersons who were waiting to be called randomly and assigned to particular cases.

Prior to their participation, venirepersons read an informed consent form, which described the nature of the study, ensured that their participation was completely voluntary and anonymous, and reiterated that they would not receive compensation for their participation. Venirepersons were also given a contact number in case they were interested in the final results of the study once the data were collected and analyzed.

Participants were then asked to complete a booklet of measures. Venirepersons were first asked to complete two death qualification questions. Participants then read a summary of the guilt and penalty phases of a capital case. They were told that the defendant has already been convicted of capital murder; they are responsible for determining the punishment. Participants were also told that they could consider anything in mitigation. Venirepersons were then asked to evaluate a list of aggravating and mitigating circumstances, select a sentence (either death or life in prison without the possibility of parole), and answer standard demographic questions.

RESULTS

In reference to the *Witherspoon* standard, venirepersons were normally distributed across the four categories of death penalty attitudes. Thirteen percent ($n = 57$) felt the death penalty is never an appropriate punishment for the crime of first-degree murder; 33% ($n = 148$) opposed the death penalty, but would consider it under certain circumstances; 37% ($n = 167$) favored the death penalty in principle, but would not consider it under all circumstances; and 17% ($n = 78$) said the only appropriate punishment for the crime of first-degree murder is the death penalty.[3] In reference to the *Witt* standard, 20% ($n = 90$) of participants felt so strongly about the death penalty that they said their views would prevent or substantially impair the performance of their duties as a juror in a capital case. Consequently, these venirepersons were classified as *Witt* excludables.

The distribution of sentence showed no evidence of ceiling or floor effects. Forty percent ($n = 178$) of venirepersons recommended the death penalty; 60% ($n = 270$) suggested a sentence of life in prison without the possibility of parole. Twenty-one percent ($n = 19$) of *Witt* excludables elected to sentence the defendant to death, whereas 79% ($n = 71$) of excludables voted to sentence the defendant to life in prison without the possibility of parole.

Aggravating and mitigating circumstances were divided into three groups: aggravators; nonstatutory mitigators; and statutory mitigators. A regression equation revealed that evaluations of aggravating and mitigating circumstances were predictive of sentence, $F(3, 139) = 12.20$, $p < .001$. Additional analyses revealed that

[3] Although the *Witherspoon* standard is moribund, we reported these findings for the purpose of comparison with earlier published results. It should be noted that a MANOVA demonstrated that death qualification using the *Witherspoon* standard was significantly related to evaluations of aggravating circumstances, $F(42, 399) = 3.87$, $p < .001$, $\eta^2 = 0.29$; nonstatutory mitigating circumstances, $F(15, 429) = 3.31$, $p < .001$, $\eta^2 = 0.10$; and statutory mitigating circumstances, $F(21, 411) = 2.21$, $p < .01$, $\eta^2 = 0.10$.

Table 1. Evaluations of Aggravators as a Function of Death Qualification

Aggravator	Death-qualified	Excludable	F value	η^2
Crime especially heinous, atrocious, or cruel	4.86	3.00	98.53	0.18
Crime committed while engaged in another crime	4.66	2.89	85.96	0.16
Crime committed to avoid arrest/effect escape	4.63	2.87	80.37	0.15
Member of a gang	4.58	3.06	60.45	0.12
Victim elderly/disabled	4.91	3.31	74.19	0.14
Crime committed for financial gain	4.69	3.17	62.53	0.12
Crime cold, calculated, and premeditated	5.33	3.45	119.39	0.21
Victim under 12	3.78	2.51	35.28	0.07
Victim police officer	4.39	2.76	70.78	0.14
Victim public official	3.93	2.52	52.41	0.11
Crime committed while on felony probation	3.60	2.73	17.46	0.04
Crime committed to disrupt/hinder laws	4.61	3.33	39.97	0.08
Previous conviction of violent felony	3.73	2.71	27.72	0.06
Knowingly caused great risk to many	4.27	3.01	42.34	0.09

Note. All means within rows are significantly different at the $p < .001$ level.

higher endorsements of aggravators indicated a greater likelihood of sentencing the defendant to death ($t = -4.14$, $p < .001$). Higher endorsements of nonstatutory mitigators indicated a greater likelihood of sentencing the defendant to life in prison without the possibility of parole ($t = 2.57$, $p < .05$). Evaluations of statutory mitigators were not predictive of sentence ($t = -1.18$, $p = .24$).

Aggravators were negatively correlated with nonstatutory mitigators ($r = -.322$, $p < .001$) and nonstatutory mitigators were positively correlated with statutory mitigators ($r = .429$, $p < .001$). Surprisingly, aggravators were not correlated with statutory mitigators ($r = .037$, $p = .66$). Because aggravators were correlated with one another (r ranged from .40 to .81, $M = 0.61$); nonstatutory mitigators were correlated with one another (r ranged from .33 to .57, $M = 0.42$); and statutory mitigators were correlated with one another (r ranged from .00 to .49, $M = 0.15$), multivariate analyses of variance (MANOVAs) were performed.

A MANOVA revealed a significant effect of death qualification on evaluations of aggravating circumstances, $F(14, 430) = 10.58$, $p < .001$, $\eta^2 = 0.26$ (see Table 1). Univariate tests demonstrated death-qualified venirepersons, as opposed to excludables, exhibited higher endorsements of all 14 aggravators.

A MANOVA revealed a significant effect of death qualification on evaluations of nonstatutory mitigating circumstances, $F(5, 443) = 11.71$, $p < .001$, $\eta^2 = 0.12$ (see Table 2). Univariate tests demonstrated excludables, as opposed to death-qualified venirepersons, were more likely to endorse all five nonstatutory mitigators.

Table 2. Evaluations of Nonstatutory Mitigators as a Function of Death Qualification

Nonstatutory mitigator	Death-qualified	Excludable	F value	η^2
History of alcoholism	2.64	3.72	28.05	0.06
Use of illegal drugs	2.40	3.53	32.77	0.07
Physical abuse as a child	2.67	3.61	21.34	0.05
Prior service in military	2.38	3.62	38.86	0.08
Use of prescription psychotropic medication	3.53	4.42	22.69	0.05

Note. All means within rows are significantly different at the $p < .001$ level.

Table 3. Evaluations of Statutory Mitigators as a Function of Death Qualification

Statutory mitigator	Death-qualified	Excludable	*F* value	η^2
Person suffering from mental/emotional disturbance	3.52*	4.21*	12.63*	0.03*
Crime committed while defendant was a teenager	3.32	2.96	5.47	0.02
Person unable to appreciate actions/conform behavior	4.08	4.12	3.12	0.01
Person was an accomplice to crime	4.22	4.48	5.63	0.02
Person under substantial duress/domination	3.77	3.47	6.01	0.02
No prior criminal history	3.46	3.34	4.68	0.02
Victim participated/consented to crime	3.66	3.55	3.44	0.01

*$p < .001$.

A MANOVA showed that death qualification was significantly related to evaluations of statutory mitigating circumstances, $F(7, 436) = 2.68$, $p = .01$, $\eta^2 = 0.04$ (see Table 3). Univariate tests demonstrated excludables, as opposed to death-qualified venirepersons, were significantly more likely to endorse only one of the seven statutory mitigators: the defendant was suffering from an extreme mental or emotional disturbance, $F(1, 442) = 12.63$, $p < .001$, $\eta^2 = 0.03$.

A chi-square test did, however, reveal a significant effect of death qualification on sentence, $\chi^2(1) = 16.31$, $p < .001$. Death-qualified venirepersons, as opposed to excludables, were more likely to sentence the defendant to death. Another chi-square test showed a significant effect of gender on sentence, $\chi^2(1) = 16.13$, $p < .001$. Men were more likely than women to sentence the defendant to death.

DISCUSSION

This study clearly demonstrates a relationship between death qualification under *Witt* and evaluations of aggravating and mitigating circumstances. As hypothesized, death-qualified participants, when compared to excludables, were more likely to endorse aggravators. Also as predicted, excludables, as opposed to death-qualified venirepersons, were more likely to endorse nonstatutory mitigators.

One surprising finding is that death qualification had minimal impact on participants' evaluations of statutory mitigators. It is noteworthy that venirepersons do not lend much weight to the factors that experienced defense attorneys have found to be the most effective in capital cases.

Excludables, when compared to death-qualified venirepersons, were more likely to endorse only one statutory mitigating circumstance: the defendant was suffering from an extreme mental or emotional disturbance. This may be due to several factors.

First, this statutory mitigator appeared to differ from the others because it implies the presence of psychopathology. Previous research has found death-qualified jurors are less receptive to psychological defenses (Cowan et al., 1984).

Second, excludables may have perceived this statutory mitigator to be most pertinent to the stimulus case. This explanation, however, appears unlikely. For example, death qualified participants exhibited higher endorsements of all 14 aggravators, regardless of their presence in the case scenario.

In general, it appears that all venirepersons, regardless of death qualification, may have considered most of the statutory mitigators to be legitimate reasons for sentencing someone to life in prison without the possibility of parole as opposed to

the death penalty. With regard to most of the statutory mitigators, it seems that all participants were inclined to give the defendant a break.

In contrast, death-qualified participants, when compared to *Witt* excludables, were less likely to believe that nonstatutory mitigators were valid reasons to give someone a life sentence. This may be due to the fact that most of the nonstatutory mitigators centered on character issues perceived to be within a person's control (e.g., alcoholism, past impairment by illegal drugs, use of psychotropic medications). It is plausible that venirepersons may have thought that the defendant assumed a certain risk factor when engaging in the aforementioned behaviors. In contrast, most of the statutory mitigators were not volitional in nature (e.g., age, unable to appreciate the criminality of their conduct or conform their conduct to the requirements of law, extreme duress or under the substantial domination of another person). Death-qualified participants may have viewed the nonstatutory mitigators as "excuses" as opposed to veritable explanations for a person's actions.

The results of this study have broad legal implications. The present findings extend a larger body of earlier research challenging capital jurors' comprehension of judicial instructions to demonstrate the salient effect that death qualification has on juries, and, consequently, due process (Diamond, 1993; Luginbuhl, 1992; Lynch & Haney, 2000; Wiener, Prichard, & Weston, 1995).

The current study points to yet another biasing effect of death qualification using the *Witt* standard. A death-qualified jury is significantly more likely to impose the death penalty than a jury comprised of excludables. This bias may arise out of the fact that death-qualified jurors are more receptive to aggravating, as opposed to mitigating circumstances. As a result, defendants in capital trials are subjected to juries that are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances. Clearly, this effect can have grave legal implications.

So, what is the legal system to do? Behavioral scientists have repeatedly concluded that death qualification results in the seating of differentially partial jurors (Bersoff, 1987). Regrettably, the United States Supreme Court has reviewed this body of research and concluded that the death qualification process is both constitutional and necessary (*Lockhart v. McCree*, 1986). Given the recent controversy surrounding a proposed moratorium on the death penalty, this issue has been brought into the forefront of American consciousness. Uneasiness about the ultimate punishment is to be expected. However, it is imperative that future research be conducted to examine the factors that impact capital jurors' decision-making processes.

The endorsement of death qualification in *Lockhart* may be settled law, but it is not settled fact. Although the state does have a legitimate interest in having capital jurors that are able and willing to impose both penalties, it may be that this guarantee is at the cost of capital defendants' right to due process (Luginbuhl & Middendorf, 1988).

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Exh. B

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Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis

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This literature review summarizes the existing research examining how the attitude a potential juror has toward the death penalty impacts on the probability of favoring conviction. The summary of 14 investigations indicates that a favorable attitude toward the death penalty is associated with an increased willingness to convict (average r = *.174). Using the binomial effect size display, this favorable attitude towards the death penalty translates into a 44% increase in the probability of a juror favoring conviction.*

Possibly the most emotional issue associated with the use of trial juries is their fairness, or the potential presence of case-relevant biases held by jurors. So important is avoiding even the appearance of juror bias that one separate phase of a jury trial, *voir dire*, is devoted solely to investigating and screening potential jurors with respect to potentially relevant attitudes, beliefs, and past experiences.

The process of *voir dire* assumed vital significance with the U.S. Supreme Court's 1968 decision in *Witherspoon v Illinois*. In the *Witherspoon* decision, the Supreme Court ruled that voir dire could not be used to exclude prospective jurors on the basis of their expressed opposition to capital punishment. To be excludable as a juror, a person must stipulate that one's attitude toward the death penalty prevents her or him from making an impartial decision on a defendent's guilt and/or automatically causes a vote against imposing the death penalty regardless of the evidence brought forth during a trial. To be a "death-qualified" juror, one must be prepared to state that one's personal view about the taking of a human life as a form of punishment comprises no violation of any moral or ethical personal standard that prevents serving as a juror. Subsequently, the Supreme Court's 1985 decision in *Wainwright v. Witt* tempered the *Witherspoon* standard, allowing exclusion of potential jurors during *voir dire* if attitudes toward the death penalty would impair performance " . . .in accordance with his instructions or his oath" (p. 852). During

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voir dire, jurors in cases in which the death penalty can be assigned as a form of punishment now undergo a determination of their *death qualification* to serve on a jury where the death penalty may be imposed.

According to Haney (1984), inclusion of death qualification in *voir dire* produces a paradox. Prospective jurors are immediately confronted with issues of guilt related to the penalty phase of the trial during the pretrial phase of jury selection. Haney views this as a "structural" problem in the logical sequence of a capital trial. Moreover, he notes five potentially deleterious consequences associated with the priming effects of death qualification procedures: (1) implication of defendant's guilt, (2) projecting penalty phase, (3) desensitizing to capital punishment, (4) public affirmation to using death penalty, and (5) personal censure implication of disqualification.

Death qualification procedural processes in *voir dire* are viewed by Haney (1984) as unique structural anomalies that occur only in capital trials. The issue of guilt is repositioned in the sequential flow of the trial. Davis and his associates (Davis, 1984; Davis, Hulbert, & Au, 1996; Davis, Stasson, Ono, & Zimmerman, 1988; Davis, Tindale, Nagao, Hinsz, & Robertson, 1984; Stasser & Davis, 1981; Stasser, 1992; Stasser, Kerr, & Bray, 1982; Tindale, Davis, Vollrath, Nagao, & Hinsz, 1990) have demonstrated order of presentation effects on apparent guilt/innocence in mock jury studies as a function of various procedural mechanisms (e.g., voting, straw polling).

Haney (1984), in effect, argues that death-qualifying *voir dire* practices tainted jury trials in capital cases. Haney's argument is quite plausible given what is generally known about the effects of group member predispositions on group decisions (Davis, 1982; Davis, Spitzer, Nagao, & Stasser, 1978; Kaplan, 1977, 1987; Kaplan & Miller, 1987; Kerr, 1992; Nemeth, 1992; Stasser, 1992). Citing Tversky and Kahneman (1973), Haney argues that asking venire persons to project themselves into a penalty phase of the trial, and estimate the likelihood of endorsing the death penalty in the event of finding the defendant guilty creates an "availability heuristic" that disposes jurors to reconstruct experiences and events in the context of meanings assigned to the cognitive category. Thus, asking prospective jurors to consider hypothetically a guilty verdict forms a category of experience about the trial that labels the defendant guilty even before the trial begins. The consequence is to poison the well (juror's mind) as a precondition of jury service.

Haney (1984) expresses concern for the desensitizing effects of an early consideration of the death penalty on jurors. The practical issue is, How does the *voir dire* process create the conditions for desensitization? Broadly conceived, group decisions emerge through informational, judgmental, or normative processes (Davis, 1982; Kaplan, 1977; Maass & Clark, 1984). Kaplan (1987), for instance, argues that normative influences form under unanimity decision rules and can have the effect of attenuating deliberation. Additionally, he notes that other research indicates that information sharing, or the concomitant state of information already being widely disseminated among members, mitigates against group polarization responses to information content (Burnstein & Vinokur, 1973, 1975, 1977; Kaplan, 1977, 1987; Kaplan & Miller, 1987; Vinokur & Burnstein, 1978, Vinokur, Trope, & Burnstein, 1975).

Maass and Clarks' (1984) review of the group majority/minority literature revealed an interesting corollary to these findings. They found that persistent minorities were more successful in situations where their positions emulated positive normative context positions already identified as salient to the group. Thus, for instance, one would expect a minority position favoring issuing a death sentence to be more successful when group members already have been positively oriented toward that decision alternative through *voir dire* interviews. And, by extension, one could expect that all jurors would experience less reactance to the death penalty as a punishment option due to its prior representation as a plausible (and thereby normatively acceptable) decision alternative. Thus, Haney's (1984) concerns over desensitization seem valid. *Voir dire* procedures for death qualification could neutralize death penalty sensitivity by symbolically reframing the salience of the death penalty for the jurors.

Two additional issues raised by Haney (1984) are tied to the public nature of trials. Existing research on juror behaviors and jury outcomes relates to what Haney refers to as "public affirmation" consequences. Public affirmation involves the public recognition that anyone screened into a death-qualified jury takes a public stance that she or he is willing to consider seriously voting for a death sentence. Sequestration (like that recommended in the California case of *Hovey v. Superior Court, 1980*) reduces the public scrutiny jurors experience in death-qualified juries. Yet this shield only exists while the trial is in session. Once concluded, the publicness of one's attitudes toward applying the death penalty are both evident and accountable through public announcement of the trial verdict and penalty.

Although the influence of public scrutiny per se is a very under researched issue, research on group decision making has dealt with public versus private disclosures of positions in the context of deliberation in groups with various sizes of attitudinal majorities and minorities (Davis, 1982; Davis et al., 1978; Kaplan, 1977, 1987; Kaplan & Miller, 1987; Kerr, 1992; Nemeth, 1992; Stasser, 1992). The evidence seems reasonably clear. The greater the perceived support for a position, majority or deviant, the more likely individual group members are to voice positions. Obviously, there exists a particularly strong connection between this evidence and the normative approach to studying group decision-making. The presence of perceived support is intrinsic to claiming a normative stance or counterarguing for group change (Moscovici, 1985; Seibold, Meyers, & Sunwolf, 1996). *Voir dire* procedures facilitate this norming function and resemble the influence models for groups, fitting Haney's thesis.

Haney's (1984) fifth contention regarding the death-qualified jury selection paradox is that exclusion-for-cause decisions (particularly when made in open court and in the presence of other venirepersons) constitute a disconfirmation of one's fitness for service as a juror by agents of the legal system. Haney argues the exclusion can be a very powerful social message, both personally ego degrading to those excused and functioning as a sort of object lesson to the venirepersons awaiting *voir dire* on death qualification and other potential exclusionary issues.

The specter of jury exclusion as an object lesson is particularly germane to a consideration of *voir dire* procedural processes. *voir dire* is widely held to be solely intended as a juror selection exercise. However, according to Elwork, Sales, and

Suggs (1981), *voir dire* also plays another, and potentially more important, role in the broader context of the trial. They contend *voir dire* is a primary site for juror *socialization* (or "indoctrination") in the norms of the courtroom and legal process.

In their summary of relevant literature on the point, Elwork et al. (1981) provide evidence indicating that the majority of *voir dire* time spent by attorneys involves attempting to indoctrinate venirepersons. While the success of these efforts is less clear, the intent is evident. The process of *voir dire* probably functions as a socializing rite of passage for venirepersons. They are questioned, sometimes demandingly, in a style similar to that which they will observe throughout the trial. More importantly, they are required to publicly commit themselves to various legal norms (e.g., open-mindedness, attentiveness, refraining from discussing the case in trial) as well as to the potential use of the death penalty in capital cases.

Haney (1984) concludes that the public ritual of death qualified *voir dire* and any exclusions-for-cause sends mixed signals to venirepersons. On one hand, they know that it is their legal right to hold a position on capital punishment, although a particular opinion could lead to exclusion. On the other hand, they observe pointed (maybe even harsh) interrogation by attorneys and judges skewed toward eliciting a public embracing of a death-qualified stance. Haney believes this contradiction breeds "tough-mindedness" among impaneled jurors and leads them to construct a self-expectation that demurring from imposing the death penalty as a punishment (if warranted) is a violation of their role as agents of the social institution of law. There is some evidence to support Haney's concerns. Padawar-Singer, Singer and Singer (1974) reported that jurors impaneled through *voir dire* were less likely to be influenced by pretrial publicity and more likely to follow interpretations of the law rendered by other officers of the court.

Clearly, the most significant stage of death qualification encompasses *voir dire*. However, Haney (1980) distinguishes the process effects of *voir dire* selection from "composition" effects caused by the prevalence of attitudes approving or disapproving of the death penalty within a community pool of possible jurors. He notes that composition effects can take various forms. Attitudes toward the death penalty may be unevenly distributed within a community pool, leading to a group of potential jurors failing to represent the community.

Attitudinal content affects jury composition in other ways. While attitudes toward capital punishment might be relatively balanced, attitudes toward defendants' apparent guilt or innocence may not be balanced. Haney (1980) notes significant biasing effects due to "prosecution-proneness" and "conviction-proneness." Prosecution-proneness emanates from attributional biases held toward individuals brought to trial. It draws on the social myth that: "Where there's smoke there's fire." One of the most influential studies of composition effects was reported by Bronson (1970/1971). He verified that prosecution-prone survey items were more strongly endorsed by persons favoring the death penalty, people at the time not excludable for cause under *Witherspoon* criteria for death qualification. A corollary attitude to prosecution-proneness is conviction-proneness. As Jurow (1971) demonstrates, potential jurors with attitudes favoring the death penalty were more likely to convict a defendant in a capital criminal case.

Composition effects have not been consistently embraced by the courts as persuasive reasons for doubting the fairness of juries. The Arkansas case of *Grigsby v. Mabry* (1983) demonstrates the tenuousness of fairness claims based on composition effects research. In *Grigsby*, a district court found that death-qualified juries were unconstitutionally biased toward conviction-proneness. This finding was upheld in 1985 by the Eight Circuit Court of Appeals. However, the U.S. Supreme Court nullified *Grigsby* a year later in *Lockhart v. McCree* (1986). The majority opinion in *Lockhart* took exception to the quality of social science research underpinning composition effects and the probity of an aggregate view of fairness (versus one based on the conscientiousness of empaneled jurors to apply the law to findings of fact).

The notion of composition effects is problematic for another reason. Modeling jury group tendencies from randomized aggregate data is equivalent to the now disprivileged practice of forming "statisticized" groups (Lorge, Fox, Davitz, & Brenner, 1958). Statistically aggregated groups, randomly sampled individuals assembled based on scores measuring some psychological attribute, can yield misleading results because they cannot emulate social interaction effects in decision-making, judgment, and problem-solving tasks (Shaw, 1981). A similar methodological shortcoming is underscored by Thompson's (1989) assessment of validity problems in classifying death-qualified or excludable jurors under *Wainwright* standards.

To summarize, there are compelling reasons to believe that demographic aggregates representing community attitudes toward the death penalty and collaterally relevant beliefs and values affect the construction of fair and impartial juries in capital criminal cases. Attitudinal composition effects do not operate independently of *voir dire* procedural processes. Composition effects are probably coupled with *voir dire* processes that lead to death-qualified jurors on jury panels that are conviction-prone and inordinately desensitized to the plausibility (if not outright desirability) of endorsing the death penalty in capital cases.

Yet, social science research on death-qualified juries is not one-dimensional. Haney's (1980) differentiation of process and composition effects in death-qualified jury formation is empirically efficacious. Composition effects have yielded scientifically compelling findings in the past, but composition effects (1) have not been successful in shaping judicial opinion and (2) are open to challenge on the grounds that they lack external validity in modeling jury group outcomes. This project seeks to explore that literature by providing a systematic quantitative summary of its findings.

META-ANALYSIS AS A METHOD OF LITERATURE SUMMARY

Meta-analysis provides a method of systematically summarizing existing empirical literature. The goal of meta-analysis is to provide an average effect for a body of research (Allen & Preiss, 1993; Preiss & Allen, 1995; Rosenthal, 1984). The process of meta-analysis involves (1) the collection of available studies, (2) the extraction of statistical information and conversion to a common metric, and then (3) the averaging of effects and the evaluation of the distribution of that information and possible moderating conditions.

Meta-analytic methodology uses a systematic form of literature review in which the individual studies are treated identically. The only provision is that the effects of each study are weighted by sampling error. The weighting is based on the assumption that a study with a larger sample size is a better estimate of the effect than a study with a smaller sample size. This consideration permits the assessment of both Type I and Type II error in a compilation of literature (Hunter & Schmidt, 1990).

The qualitative features that distinguish studies from one another, that is, methodological differences, serve as possible sources of intervening influences. In other words, the methodological distinction between studies could be the source of divergent effects. This possibility is considered by addressing whether the observed variability in effects could be the outcome of random sampling error or the outcome of some other systematic influence that differs among the studies.

The goal of meta-analysis is to generate findings that represent an entire body of literature. The procedural process requires that researchers use explicit sets of rules. Explicit commitment to rules regarding the acquisition and analysis of data means the outcomes of the process can be replicated by other researchers. Non-quantitative reviews of the literature, often called narrative reviews, are difficult to compare because the basis of the literature search and the methods used by the investigator are not articulated in a manner that permits replication.

More importantly, meta-analytic findings can be compared to additional data sets not included in the original analysis and provide the basis for subsequent research efforts. Thus, future or newly uncovered research can be compared using the existing meta-analysis as a basis for comparison. Another important issue is that procedural variations as safeguards may be considered. The outcome from a different procedure can be compared to the current procedures to determine whether differences in outcomes occur. The explicitness of the method permits future reviewers to evaluate the adequacy and accuracy of any claim advanced.

METHODS

The process of conducting a meta-analysis has three basic parts: (1) obtaining literature to be included in the summary, (2) coding potential moderator variables, and (3) conducting the statistical analysis. Each procedure will be detailed so that others can replicate the methods used to generate the findings.

Literature Search

Literature was obtained through a search of electronic data bases (Psychlit, ComIndex) and a manual search of the *Index to Legal Periodicals* using the terms "capital punishment," "death penalty," and "execution." In addition, the reference section of reports generated by the previous procedures were examined for additional information.

To be included in this investigation, a report had to meet the following conditions:

(a) It had to provide a means of identifying how respondents evaluated the acceptability of the death penalty.
(b) It had to provide some means of evaluating how likely the persons were to convict or evaluate a criminal legal proceeding.
(c) It had to contain statistical information presented in a form recoverable for this analysis.

A number of reports were collected that did not contain information contributing to this synthesis. For example reviews or reexamination of existing data (Diamond, 1993; Kadane, 1983, 1984; Knowlton, 1953; Krauss, 1987), explorations of jury instructions (Luginbuhl, 1992; Sontag, 1990), of various methods of selecting venirepersons (Cox & Tanford, 1989; Neises & Dillehay, 1987; Nietzel & Dillehay, 1992), or comparisons of conviction rate data (Ellsworth & Ross, 1983; Fatah, 1979; Judson, Pandell Owens, McIntosh, & Matschullat, 1989; Osser & Berstein, 1968), and studies that removed persons against the death penalty (Wiener, Pritchard, & Weston, 1995; Winick, 1982) or did not include a measure of guilt of the accused (Crosson, 1966; Fitzgerald & Ellsworth, 1984; Luginbuhl & Middendorf, 1988; Tyler & Weber, 1982) were not included in this analysis. The Appendix provides some details on the investigations included in this analysis.

Coding for *Voir Dire*

A central issue is whether the studies invoked some type of formal questioning process to get potential jurors to state opinions about *voir dire*. Associated with the issue is whether measurement of attitudes toward the death penalty were consistent with the legal standards for exclusion. This meta-analysis coded a study as *voir dire* if the jurors participated in the process of questioning or the process was intended to elicit an answer that would meet the legal standards for exclusion (at the time of the conduct of the study). The information for each study is found in Table 1. Two studies presented difficulty (Goldberg, 1970; Haney, 1984b) when assigning codes. The Goldberg study used a procedure that asked participants whether they possessed "conscientious scruples" against the death penalty to assess attitudes. This procedure was determined to not comprise a *voir dire* process. The Haney study had participants view a *voir dire* process either with or without a death qualification series of questions. While the participants viewed this process on videotape, they did not participate in the process. We decided not to consider this process as one that qualified as *voir dire* since the respondents did not directly participate.

Statistical Analysis

Meta-analysis requires that statistical information obtained from the investigations become converted to a common metric. This investigation used the correlation coefficient as the metric for comparison analysis. The correlation coefficient was selected because the metric is more simply manipulated statistically and easily interpreted. The process used in this analysis follows the statistical procedures out-

Table 1. List of Effects Used in this Investigation

Study[a]	Effect	Sample	Process[b]
Bronson	.147	664	NVD
Cowan	.190	288	VD
Dillehay	.288	143	VD
Ellsworth	.200	500	NVD
Goldberg	.085	200	NVD
Haney (1984b)	.301	67	NVD
Haney (1994)	.175	498	VD
Hester	.187	151	NVD
Jacoby	.165	329	NVD
Jurow	.194	211	NVD
Moran, study 1	.058	319	NVD
Moran, study 2	.034	346	NVD
Robinson	.272	609	VD
Thompson	.595	33	VD

[a]Only first author for each study listed, see the References section for complete citation.
[b]NVD, not *voir dire*; VD, *voir dire*.

lined by Hunter and Schmidt (1990) that are used in the computer program MetaCOR (Hamilton & Hunter, 1992).

After conversion to a common metric, the individual effects from investigations are averaged using a procedure that weights each effect by the sample size of the original investigation. This weighting assumes that investigations with larger sample sizes generate more accurate (estimates with less sampling error) effects than studies with smaller sample sizes.

The next step in the process requires an examination of the variability of the effect sizes. The issue is whether the diversity in effects is attributable to sampling or some other source of variation. If the individual effects differ from each other, such variation may be the result of sampling error. A chi-square test on the data set compares the expected amount of variability based on the average effect and the available sample size to the actual variance observed.

A significant chi-square indicates that there is more variability than expected due to random sampling error. This finding would indicate the probable existence of a moderator variable. The chi-square's significance would indicate that more variability than expected exists and therefore that some other source of variability probably exists.

To calculate the number of unpublished (or "file drawer") studies that contain nonsignificant results, a fail-safe *N* procedure outlined by Rosenthal (1984, pp. 108–111) was used. The estimate provides the number of studies that would have to exist for any significant findings be become nonsignificant.

RESULTS

A total of 14 studies were included in the analysis. The average effect indicates that persons favoring the death penalty were more likely to favor conviction of a

defendant (average $r = .174$, $k = 14$, $N = 4{,}358$, var. = .0064). This average effect was significantly different from 0 (95% confidence interval [CI] = .156, $p < .05$), and according to Rosenthal's procedure there would have to be 328 unpublished studies with null findings to change this conclusion. The sample of correlations used to compute this average effect was heterogeneous, χ^2 ($df = 13$, $N = 4358$, $k = 14$) = 27.76, $p < .05$. Heterogeneity indicates that the average effect should be interpreted with caution since the presence of a moderator variable is likely.

One empirical investigation (published multiple times, Moran & Comfort, 1982, 1986) contained two data sets that had the dependent variable measured two different ways. The study involved persons who served on felony juries. The study asked for two responses: (a) the predeliberation verdict of the juror and (b) the legal verdict reached by the jury. The correlation in study 1 between the predeliberation verdict and attitude toward the death penalty was positive ($r = .113$). The correlation between the legal verdict of the jury and juror attitude toward the death penalty was substantially lower $r = .003$). This pattern was replicated in study 2 with the predeliberation correlation ($r = .113$) and the legal verdict correlation ($r = -.045$). The value in Table 1 represents an average of the available values.

When the predeliberation verdict correlation from the Moran and Comfort study is used (a procedure similar to that of other investigations) the average correlation rises slightly (average $r = .184$, $k = 14$, $N = 4358$, var. = .0043). The average correlation then is homogeneous χ^2 ($df = 13$, $N = 4{,}358$, $k = 14$) = 19.294, $p > .05$, but still significantly different from 0 (95% CI = .130, $p < .05$). The number of null studies calculated by the fail-safe N procedure was far larger, 549.

The collection of studies uses predeliberation juror attitudes, which may not necessarily reflect actual legal verdicts that juries would reach. It should be noted that the Moran and Comfort data (1982, 1986) dealt with all felony cases and were not restricted to cases where the death penalty was available. Therefore, the issue of the death penalty and the qualification for jury service was probably not raised in *voir dire* for most of the trials.

Effects of *Voir Dire* Process

Five investigations used *voir dire* to ascertain attitude toward the death penalty. The average correlation was positive (average $r = .236$, $k = 5$, $N = 1571$, var. = .0052). The distribution of effects was homogeneous, χ^2 ($df = 4$, $N = 1{,}571$, $k = 5$) = 7.891, $p < .05$. The sample of effects demonstrated an average correlation whose confidence interval did not include 0 (95% CI = >.139, $p < .05$). The fail-safe number of studies was smaller but still relatively large, 94.

Nine investigations not using a *voir dire* process that included measures of attitudes about the death penalty demonstrate a homogeneous, χ^2 ($df = 8$, $N = 2{,}787$, $k = 9$) = 15.507, $p > .05$, and significant (95% CI = >.122, $p < .05$, 114 fail-safe studies required) positive relationship (average $r = .140$, $k = 9$, $N = 2{,}787$, var. = .0048). This set of studies contained both estimates from the Moran and Comfort (1982, 1986) data and was reanalyzed using only the predeliberation attitudes. The positive correlation increased slightly (average $r = .155$, $k = 9$, $N =$

2,787, var. = .0027), is still homogeneous, χ^2 (df = 8, N = 2,787, k = 9) = 5.145, $p > .05$, and significant (95% CI = .086, $p < .05$ and would require 267 null studies using Rosenthal's fail-safe method).

A comparison of the *voir dire* and non-*voir dire* average effects indicates that the *voir dire* impact is larger when using either the average Moran and Comfort (1982, 1986) effects (d = 1.43, $p < .05$) or the predeliberation effects (d = 1.42, $p < .05$). The results indicate that the use of a *voir dire* process increases the impact of attitudes toward the death penalty on attitudes toward guilt and punishment of the defendant.

DISCUSSION

The results indicate that the more a person favors the death penalty, the more likely that person is to vote to convict a defendent. The data do not indicate the reasons for this trend. In other words, the results indicate a relationship between death penalty attitudes and predeliberation verdicts, but the current analysis does not uncover the mechanism for the relationship between these two attitudes.

One limitation is the possibility that a large number of investigations may exist that are unavailable to public sources because they are held by law firms, private research foundations, and other parties. This means that the conclusions offered in this summary are less accurate than would be possible if such proprietary data became available. However, using the method of fail-safe N, the number of studies with nonsignificant or null findings necessary to challenge this conclusion is so large, numbering in the hundreds, that this possibility appears unlikely. The lack of available studies reduces the ability to test possible explanations for the effects observed in this data base.

Another factor deserving of comment is the fact that the designs analyzed measured propensity to convict and seldom considered actual jury verdicts. Instead, the information came from the judgments of individuals exposed to a given case and not as the result of interaction with others. The argument for conducting jury trials is that the process of deliberation requires the formulation and testing of opinions. The verdict of a jury is the outcome of a process of deliberation. The designs in this set of empirical studies did not use that process. We would argue, however, that inputs into that process are changed by the *voir dire* process that systematically deletes part of the potential opinion pool. The conclusion flowing from previous research in this area is that the systematic exclusion of a part of the juror pool more likely to acquit biases the process of deliberation in favor of conviction. While the process of deliberation occurs, the diversity of opinion is restricted in a manner that increases the probability of conviction. However, without date regarding deliberation effects, the potential remains that other factors may better explain this outcome.

The impact of death penalty attitudes on the evaluation of guilt is linear. Thus, even minimal restrictions of juror membership using any type of death qualification can create a jury more likely to convict. Moreover, the persons with the strongest

scruples against the death penalty have the greatest resistance to a vote for conviction.

To illustrate the nature of the effect, consider Rosenthal's (1984) binomial effect size display (BESD) technique. Suppose that across a population of individuals, there is a 50% probability of any person voting for conviction in a trial. Suppose, too, that we divide the population at the median on the basis of attitudes about the death penalty. The question is: What percentage of persons favoring the death penalty would be likely to vote for a conviction versus what percentage of persons would be likely to vote for conviction from a pool of persons? Table 2 provides a representation using the average effect observed in this report. Persons in favor of the death penalty would be 59% likely to vote for conviction while persons against the death penalty would be 41% likely to vote for conviction. The impact of a relatively small correlation ($r = .174$) is a 44% increased probability (going from 41% to 59%) of proneness to vote for conviction. The effect is linear; persons with strongest attitudes are either more or less likely to convict based on attitude toward the death penalty.

The results of this summary support arguments about the biasing effect of both composition and *voir dire*. Composition effects are illustrated in the investigations that did not use *voir dire*. Indirectly, the Moran and Comfort (1982, 1986) studies support this conclusion. Predeliberation verdicts in felony cases demonstrate a bias on the part of the juror not reflected in legal verdicts. However, in noncapital cases (the majority of felony trials) the jurors are not excluded on the basis of death penalty attitude. The result may be a "balancing" effect that occurs in a deliberation where all views are represented, making the final legal verdict independent of this attitude. However, in a capital trial, the number of persons leaning toward acquittal is reduced, increasing the composition of the jury panel leaning toward conviction.

The findings of this meta-analysis make Haney's (1984) conclusions about the structural sequencing paradox inherent in complying with *Witherspoon* through *voir dire* procedural processes more compelling. The data support the conclusion that death-qualified *voir dire* practices produce jurors more likely to render guilty verdicts and therefore more likely to invoke the death penalty as a form of punishment. Studies using some attempt at *voir dire* demonstrate stronger effects than studies simply assessing attitudes toward the death penalty. This difference provides a measure of support for Haney's claims. The distinction needs to be made between "necessary" and "sufficient" claims. The observed relationships are probably nec-

Table 2. Binomial Effect Size Display of Findings (BESD)

	Pecentage voting for	
	Conviction	Acquittal
Favor death penalty	59	41
Against death penalty	41	59

Note: Assuming average correlaton of .174. The illustration assumes that the division on attitude about the death penalty is done using a median split and that there is across the population a 50% chance of conviction. The percentages provide a relative probability therefore of conviction.

essary to sustain the Haney hypothesis. However, the lack of explanatory testing does not permit a claim that the data provide evidence to support the inference that the conditions are sufficient to validate Haney's hypothesis.

The *voir dire* processes in these investigations were comparatively weak and less public than those involved in an actual trial. An argument could be made that the effect in actual trials is stronger than reported by these studies. The problem is that the limited data base and methodological choices made by investigators do not permit an assessment individually of each of the claims Haney advances. Whether some particular aspect of the process is the cause could not be determined and therefore no suggestions for remedies are possible. While Haney (1984) outlines an entire set of possibilities, it is not clear that all of these are contributing to the observed effects.

Since *Witherspoon*, there has been at least one important opinion on death qualification handed down at the state level. That was in California: *Hovey v. Superior Court* (1980). *Hovey* addressed some of the problems of death qualified *voir dire* raised by Haney (1984). Specifically, the opinion in *Hovey* introduced the concept of "jury neutrality" and ruled that neutral juries should reflect community diversity on relevant viewpoints besides being fair and impartial. The California Supreme Court also exercised its special authority to rehabilitate the State's criminal procedures and implemented *sequestered voir dire* in capital cases. Specifically, the Court acted to require each qualified *voir dire* examination be conducted out of the presence of both open court and other venirepersons. Thus, the indoctrination consequences of *voir dire* might be significantly attenuated—at least in California.

Clearly, however, Haney's paradox is not resolved (not even by *Hovey*, should it be widely adopted). The simplest solution, of course, would be to abolish the death penalty altogether. According to Gross's (1984) analysis of *Hovey,* it did not adequately resolve the problems associated with composing juries representative of diverse community viewpoints that could be demonstrably proven to be fair and impartial. Moreover, *Hovey* does not address the problems of pretrial cognitive priming that jurors experience in *voir dire*, sequestration notwithstanding. It should be pointed out that Haney's critique of death-qualified *voir dire* has not been directly supported by empirical data. At best, we have provided selected analytical interpretations of existing data as supporting evidence. Fortunately, Haney's arguments are easily translated into research designs that could directly support or refute the claims. We view research along these lines as clearly efficacious until simpler solutions to the quandaries posed by capital punishment emerge.

Additional research is needed using both primary data collection and meta-analysis. The propensity of a "death-qualified" jury to convict a defendant more often is probably the outcome of some other related factors that cause both a belief in the death penalty as well as a conviction proneness. Whether this might be viewed as a moral, political, or other ethical system that creates a propensity for both outcomes remains unclear. However, the issues surrounding the death penalty indicate that the use of screening during *voir dire* creates a jury more likely to convict a defendant than would normally occur if the question were not used to screen potential jurors.

Meta-analysis of existing research on various aspects of the trial process should provide a means of assessing various aspects of *voir dire* and the trial process. Reinard and Geck (1997), for example, illustrate that "inadmissible" evidence affects verdicts. Their findings illustrate the importance of admissibility rulings on evidence occurring outside the presence of the jury. As more meta-analytic summaries are conducted, the process of evaluating aspects of the judicial system should improve.

APPENDIX. DESCRIPTION OF DATA SETS

- Bronson (1970/1971). This study used jury lists in Colorado to select persons for the survey (50% in person, 50% by phone). The survey asked participants to agree with statements about the need for law and order and the presumption of guilt in a trial (measure of conviction-proneness). The measure of attitude toward the death penalty asked the degree to which a person favored the use of the death penalty.
- Cowan, Thompson, and Ellsworth (1984). A sample of 288 adults qualified for jury service were classified as either excludable or not under *Witherspoon.* The jurors were asked the *Witherspoon* questions over the phone in a mock *voir dire* process. The participants then watched a 2½-hour videotape of a simulated homicide trial. Afterward the participants rated their willingness to convict.
- Dillehay and Sandys (1996). This study surveyed randomly selected former jurors in Kentucky. The jurors were asked questions (based on the *Witt* criteria) to determine suitability to be on a capital jury. The jurors were also asked questions about how they would perform on a capital jury (willingness to convict).
- Ellsworth and Ross (1983). Five hundred adult residents of the San Francisco area were surveyed and asked about level of support for the death penalty and level of evidence necessary to vote for guilt.
- Goldberg (1970). Two hundred undergraduates enrolled in colleges in Georgia were told to imagine they were members of a jury, and were asked if they would they have "conscientious scruples" against the use of the death penalty. The participants read a summary of 16 cases and reported whether they would vote for conviction.
- Haney (1984). Sixty-seven adults living in Santa Cruz County participated. There were two groups: (a) one saw a 1½-hr videotape with *voir dire* conducted by attorneys and a judge, and (b) the other saw the same tape, but with ½ hr added of death qualification *voir dire.* After this the participants completed questionnaires assessing their belief in the death penalty and probability that the defendant was guilty.
- Haney, Hurtado, and Vega (1994). In telephone interviews of 498 adult California residents, the participants were asked "legally correct formulations of the related death-qualification questions." In addition, the respondents were asked about their attitudes toward the criminal justice system.

- Hester and Smith (1973). A sample of 151 undergraduate students read a case either of a heinous or gang murder and were asked to determine guilt and a choice of imprisonment or the death penalty as a punishment.
- Jacoby and Paternoster (1982). A sample of 329 persons was surveyed by telephone in South Carolina, asking about an actual murder trial about to commence. The participants were asked their attitudes toward the death penalty as well as beliefs about the guilt of the accused.
- Jurow (1971). Adult employees of a large industrial plant participated in a survey. The survey asked the respondents about their general attitude toward the death penalty, and contained brief descriptions of 14 cases involving potential application of the death penalty. The subjects were to assume the guilt of the accused and select among three possible penalties: (a) life imprisonment without parole, (b) life imprisonment with parole possibility after 20 years, and (c) the death penalty.
- Moran and Comfort (1982, 1986). Study 1 used mailed questionnaires returned from 319 persons who had served on felony juries. The survey asked persons to respond to items about their attitudes toward the death penalty. Another series of questions asked about the predeliberation verdict and legal verdict of the trial. Study 2 used the same measures as study 1 and received mailed responses from 346 persons who had served on felony juries
- Robinson (1993). This study gave 602 undergraduate students in San Francisco the basic *Witherspoon* questions. The students then read five vignettes and were asked to imagine themselves on a jury and whether they would impose the death penalty.
- Thompson, Cowan, Ellsworth, and Harrington (1984). Thirty-six adults in California eligible for jury service participated in this study. Each person was shown a scripted videotape simulation of two witnesses whose testimony conflicted. The participant's attitudes toward the death penalty were measured relevant death qualification. After watching the videotape the participants were asked which witness (prosecution or defense) they believed as well as their general view of the favorableness of the case for each side.

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Exh. C

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The Death-Qualified Jury and the Defense of Insanity

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We predicted that people who are excluded from serving on juries in capital cases due to their opposition to the death penalty (excludable subjects) tend to place a greater value on the preservation of due process guarantees than on efficient crime control, and therefore are more likely to accept an insanity defense in criminal cases than are people who are permitted to serve on capital juries (death-qualified subjects). Subjects who had previously been classified as death-qualified or excludable read four summaries of cases in which the defendant entered a plea of insanity, and made judgments of guilt or innocence. In the two cases involving nonorganic disorders (schizophrenia), death-qualified subjects were significantly more likely than excludable subjects to vote guilty; in the two cases involving organic disorders (mental retardation and psychomotor epilepsy), there were no differences between the two groups. In addition, excludable subjects gave significantly higher estimates than death-qualified subjects of the proportion of defendants pleading insanity who "really are" insane.

INTRODUCTION

The number of criminal defendants who plead "not guilty by reason of insanity" is relatively small (Stone, 1975), but the amount of discussion and controversy generated by the insanity defense has been enormous. The idea that a person who has committed an atrocious crime can be acquitted on the grounds of insanity is disturbing to many people, and has been so at least since the time when the basic right-from-wrong standard for determining legal insanity was laid down by the British Common Law Courts following the M'Naghten case[1] in 1843. In fact, the formulation of the M'Naghten right/wrong standard was a direct response to

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[1] *M'Naghten's Case*, 10 Clark & Finnelly's Reports 200 (1843).

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the widespread public indignation aroused by M'Naghten's acquittal and commitment to Broadmoor.

Public skepticism about the insanity defense does not seem to have diminished greatly since the mid-nineteenth century. In three opinion surveys conducted during the 1970s (Bronson, 1970; Harris, 1971; Fitzgerald and Ellsworth, this issue) a substantial majority of each of the populations sampled agreed that the plea of insanity is a "loophole" that allows too many guilty people to go free. Indeed, the American public's excited condemnation of John Hinckley's acquittal in 1982, their clamor for a more restrictive insanity defense, and many lawmakers' hasty compliance with the demands of the moment are indistinguishable from the aftermath of the M'Naghten case. Despite the enormous advances in scientific knowledge about psychopathology since M'Naghten's times, the general public seem no more willing to show mercy or understanding for those afflicted with mental disorders, at least not for those who break the law. In fact the reforms that have been proposed in the wake of the Hinckley case have generally attempted to limit the M'Naghten rule still further. Why do people react so negatively and care so strongly about the handful of wrongdoers who plead insanity?

As part of a much larger study of jurors' reactions to the insanity defense, Simon (1967) attempted to discover whether there were other attitudes that might predict how favorably jurors would react to a defendant entering a plea of insanity. Simon had her jurors listen to a tape recording of an incest trial in which the defendant pleaded not guilty by reason of insanity, and used their predeliberation verdicts as her criterion of favorability. Of the 816 jurors, 67% voted guilty and 33% not guilty by reason of insanity. Before they heard the case, Simon gave her jurors questionnaires designed to measure sympathy for the mentally ill, sexual permissiveness, and "knowledge and attitudes about psychiatric interpretations of motivations and behavior" (1967, p. 126). She found no relation between any of these attitudinal measures and the jurors' verdicts.

Weak and inconsistent relationships between the individual characteristics of jurors and jury verdicts are common in the research literature, leading some social psychologists to conclude that "jurors are much more responsive to the evidence placed before them than to their own personalities and attitudes" (Saks and Hastie, 1978, p 70; see also Davis, Bray, and Holt, 1977; and Penrod, Note 1).

And yet this conclusion is unsatisfying. The evidence is undoubtedly a powerful force, but it is rarely powerful enough to assure unanimity on first ballot verdicts, either in real or simulated trials (Kalven and Zeisel, 1966; Hastie, Penrod, and Pennington, in press). In most trials different jurors interpret the same evidence in different ways; since the stimulus situation is constant, the variability in interpretation must be due to individual differences. And these differences are consequential. One of the most consistent findings in research on jury decision making is that the first ballot split is an excellent predictor of the final outcome. While the size of the initial majority is certainly due in part to the strength of the evidence, it is not entirely so. Different juries hearing the same trial begin with different splits, and end with different verdicts (Davis, Bray, and Holt, 1977; Hastie, Penrod, and Pennington, in press).

The questions Simon asked her jurors were primarily designed to tap attitudes toward mental illness. It may well be that people's mistrust of the insanity defense stems more from their attitudes toward criminals than it does from their attitudes toward the mentally ill. For example, people who endorse the statement, "The plea of insanity is a loophole allowing too many guilty people to go free" are also likely to endorse statements that express an ideological concern with efficient crime control, while those who disagree with it tend to value the preservation of due process guarantees over maximally efficient procedures of arrest and conviction (Bronson, 1970; Harris, 1971; Fitzgerald and Ellsworth, this issue; and see Packer, 1968 for a discussion of these two contrasting ideological orientations). Those who place a high value on crime control relative to due process tend to feel that a defendant who fails to testify is probably guilty, that all laws should be strictly enforced regardless of the consequences, that the rules prohibiting the use of illegally seized evidence in court should be relaxed, that convicting the innocent is no more regrettable than acquitting the guilty, and that the death penalty should be retained (Packer, 1968; Fitzgerald and Ellsworth, this issue). Stated most simply, the assumptions are that anyone who breaks the law should pay the price, regardless of mental state or due process guarantees, and that society must protect itself against criminals by means of swift, certain, and severe punishment.

It appears that this sort of crime control ideology has underlain objections to the insanity defense at least since M'Naghten's case. Simon (1967) reports that the public outrage that followed the M'Naghten acquittal was partly fueled by a general fear of crime stimulated by a series of recent assassination attempts, and partly by the belief that M'Naghten was not being adequately punished by being sent for life to Broadmoor ["a retreat for idlers," according to the press (Simon, 1967, p 22)].

Thus we predicted that people with a strong crime control ideology would be more likely to vote for conviction in a case involving the insanity defense than people with a strong due process ideology. We measured people's concern with crime control by asking them about their attitudes toward the death penalty. Theoretically and empirically, attitudes toward the death penalty have consistently shown powerful relationships with other crime control attitudes, and play an important role in defining people's ideological self-image in regard to their stand on criminal justice (Vidmar and Ellsworth, 1974; Ellsworth and Ross, 1983; Smith, 1976). Practically, attitudes toward the death penalty are used to disqualify people from jury service in cases where the prosecutor is asking for the death penalty. Since favorable attitudes toward the death penalty are correlated with a mistrust of the insanity defense, this practice could result in juries that are more likely to convict a mentally disturbed defendant than juries drawn from the whole spectrum of community attitudes would be.

The finding that attitudes toward the death penalty are related to attitudes toward the insanity defense is a robust one, having emerged in several surveys (see above), and in one study where subjects read 16 very brief descriptions of crimes involving injury or death and were asked to give their verdicts (Goldberg, 1970). Goldberg found that people with conscientious scruples against capital

punishment were slightly but significantly more likely to vote to acquit by reason of insanity. While these results are suggestive, they are inconclusive. First, the "cases" in the Goldberg study were only a sentence or two long and were not chosen with the appropriateness of an insanity defense in mind, the subjects were given no instructions on the legal definition of insanity, and there is some evidence that a substantial number of subjects did not understand the meaning of the term "conscientious scruples." More important in a practical sense, Goldberg's "scruples" question is no longer the legally permissible question to designate the group that may be excluded from jury service. Following *Witherspoon v. Illinois* (1968),[2] the excludable group is limited to those who state unequivocally that they could not vote for a penalty of death. We have survey evidence that people who fall into this excluded group are more favorable to the defense of insanity than are the "death-qualified" jurors who are permitted to decide capital cases (Fitzgerald and Ellsworth, this issue), and that they are more likely to vote for acquittal in a homicide case where insanity is not an issue (Cowan, Thompson, and Ellsworth, this issue). In the present study, we examined the tendency of death-qualified and excludable jurors to vote for conviction in cases where the defendant's sanity was the major issue, and in so doing to extend the generality both of the survey results and of the conviction-proneness research.

Finally, in a more exploratory vein, we included two cases in which the defendant's mental disturbance had a clear organic component and two cases in which it did not. Our intuition was that it is the concept of a purely *mental* illness that troubles those with a strong crime control orientation, and raises suspicions of malingering or willful refusal to conform to the most fundamental norms of society. Whereas people who feel that the insanity defense is a "loophole" may be willing to regard a "real" medical problem as an excuse, they may feel that they have to draw the line at so-called "diseases" of the imagination. Likewise, they may regard a doctor who testifies to an organic cause as a more credible source than one who can only point to social or psychological causes.

The mitigating role of physical factors is vividly suggested by the case of James Hadfield,[3] which preceded the M'Naghten case by 40 years. In that case, the jury accepted the argument that a person could understand the difference between right and wrong and still be absolved from legal responsibility if his criminal act was the product of a mental disease, adopting a liberal criterion that was negated by the M'Naghten rule and that did not reappear until the Durham rule[4] a century and a half later. Simon (1967) suggests that the defendant's bizarre physical appearance may well have influenced the jury to accept a standard so far ahead of the values of the time: "From all accounts, Hadfield's appearance at the trial was grotesque. He had sustained terrible head wounds during battle, and Thomas Erskine, his counsel, stated that 'his head hung down as though it had been almost dissevered,' and that he had 'been cut across all the nerves which give sensibility and animation to the body' " (Simon, 1967, p 18).

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[2]*Witherspoon v. Illinois*, 391 U.S. 510 (1968).
[3]*Hadfield's Case*, 27 State Trials 1281 (1800).
[4]*Durham v. U.S.*, Federal Reporter, 214 2d (1954).

Thus on a theoretical level our purpose was to find out whether people who hold strong crime control values, as epitomized by their favorable attitudes toward the death penalty, are unlikely to accept a defense of insanity when given specific cases to consider, relative to people who hold strong due process values. Second, we wanted to find out whether any such reluctance to accept an insanity defense is manifested primarily in consideration of truly "mental" cases, without an organic component, or whether it is a bias against all uses of the defense. Finally, in a more applied vein, our purpose was to determine whether jurors who are qualified to judge the guilt or innocence of capital defendants are more prone to convict when the defendant pleads not guilty by reason of insanity than are those jurors who are disqualified.

METHOD

Subjects and Their Attitudes Toward Capital Punishment

The subjects in this study were 35 adults eligible for jury duty in California. All of them had previously participated in research at Stanford University, and were recruited by telephone from the earlier subject lists and offered $5.00 for their participation. Their ages ranged from 18 to 70 ($\bar{x}$ = 41.7), 24 of the 35 were female, 33 were white, and 10 had had some jury experience.

As part of their recruitment for the earlier research, all subjects had been asked a question following the criteria set down in *Witherspoon v. Illinois* (1968) to determine whether or not their attitudes toward the death penalty would disqualify them from serving on a capital jury.[5] As part of the same screening procedure, prospective subjects were also asked whether their attitudes toward the death penalty were so strong that their ability to reach a fair and impartial verdict in deciding the guilt or innocence of a capital defendant would be impaired. Respondents were not included as subjects in either study if they said that they "would not be fair and impartial in deciding the question of guilt or

[5]The text of that question was as follows:

> Now assume that you've been called as a possible juror in a first degree murder trial. The prosecutor is asking for the death sentence. Since this is a case where the death penalty may be imposed, the judge will ask you certain questions about your attitude toward the death penalty before deciding whether or not you should be chosen to serve on the jury.
>
> There are two parts to any trial where the death penalty may be imposed. In the first part, the jury decides whether the person on trial is guilty or not guilty. If the person is found guilty, there is a second part—a separate trial—in which the jury decides whether he or she should get the death penalty or life in prison.
>
> The judge will ask you the following question:
>
> Is your attitude towards the death penalty such that as a juror you would never be willing to impose it in any case, no matter what the evidence was, or would you consider voting to impose it in at least some cases?
>
> (a) I would be unwilling to vote to impose it in any case.
>
> (b) I would consider voting to impose it in some cases.

innocence, knowing that if the person was convicted he or she might get the death penalty."

Thus, all of the subjects in the present study had previously stated that they could be fair and impartial with respect to guilt. Their eligibility to serve on capital juries, as defined by their attitudes toward imposing the death penalty at the penalty phase of the trial, was the major independent variable in this study. Subjects for this study were randomly drawn from the groups defined as "death-qualified" and "excludable" in the original screening, resulting in 19 death-qualified and 16 excludable subjects.[6] The screening had occurred several weeks before the subjects were contacted for participation in the present study, and had included a number of questions in addition to those relating to death penalty attitudes, and none of the subjects were aware that this was a variable in our study.[7]

Procedure

Each subject read four page-long summaries of homicide cases in which the defendant pleaded not guilty by reason of insanity. The order of presentation was randomized. All of the summaries were based on actual cases. In two of them, the defense psychiatrist testified that the defendant was schizophrenic. In the first, ("People v. Watkins"), a 28-year-old woman suffocated two infants she was babysitting for, and cut into their bodies with a razor. She claimed she did it in order to be sentenced to death, because she lacked the nerve to kill herself. She further testified that she was hearing voices compelling her to "kill the kids . . . kill yourself." The defense psychiatrist testified that she was suffering from acute schizophrenia and depression, and that her hallucinations were so strong that she was unable to control her behavior at the time. The prosecutor argued that "Watkins knew exactly what she was doing because, as she stated in her own confession, she killed specifically in order to get the death penalty."

In the second case (based on the M'Naghten case), McClinton, 32 years old, shot and killed an assistant to the mayor of San Diego, mistaking his victim for the mayor himself. A psychiatrist for the defense testified that McClinton was suffering from paranoid schizophrenia, and had delusions that the mayor was constantly planning ways to demean and humiliate him and had even tried to poison his food. The psychiatrist argued that because of his delusions, McClinton lacked the capacity to understand what he was doing, and believed that his behavior was justifiable self defense. The prosecutor argued that the psychiatric interpretation was incorrect, and that McClinton knew what he was doing and should pay for his crimes like any other assassin.

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[6]A total of 38 subjects were approached. Two declined to participate and one failed to complete all of the questions and so was not included in the analysis.

[7]It was later determined that none of the subjects in the present study would be disqualified from serving on a capital jury due to their uncompromising insistence on imposing the death penalty *whenever* it is permissable. That is, all subjects who were classified as death-qualified in this study said that they "would be willing to consider voting for life imprisonment or death depending on the evidence that I heard in the case."

Neither of these two cases involved any organic component. The other two cases did. In the first ("People v. Lopez"), a 32-year-old man with an IQ of 60 took his father's gun, robbed a liquor store, and killed the proprietor, after watching a television program about a gang of hold-up men. Lopez said that he robbed the store because he wanted money to buy candy and cigarettes, and that he shot the proprietor "because robbers are supposed to." The defense psychiatrist testified that Lopez' ". . . intelligence is so limited that he could not have appreciated the seriousness of his crime." A prosecution psychiatrist testified that Lopez ". . . was sufficiently intelligent to know that stealing and murder are wrong."

The second organic case (in which the technical defense was "unconsciousness" rather than insanity) involved a 28-year-old man named Carson, who killed his roommate by bashing him repeatedly on the head with a baseball bat. He testified that just before the killing "everything went blank" and that he didn't remember actually hitting his roommate. A psychiatrist for the defense stated that Carson had psychomotor epilepsy, and that people suffering from this condition sometimes have seizures during which they perform violent, repetitive acts while in an unconscious state, such as repeatedly striking something. The prosecutor argued that there was no proof that Carson was unconscious at the time of the crime, or that the killing occurred as a result of a seizure.

After reading each case, the subject answered questions about the applicability of the five elements of the American Law Institute (ALI) test of legal insanity then in use in California courts: (1) presence of substantial mental disease or defect, (2) at the time of the crime, (3) causing the crime, due either to (4) the defendant's inability to appreciate the criminality (wrongfulness) of his/her conduct, or to (5) the defendant's inability to control his/her actions enough to obey the law.

Next, subjects were asked to assume that they were jurors in this case, and told that as jurors they were under obligation to follow the law as set forth for them in the judge's instructions. For three of the cases, the judge's instructions consisted of the requirement that the subject find the defendant not guilty if s/he was legally insane according to the criteria in the ALI standard, and these criteria were spelled out. The text of the judge's instructions was as follows:

> You should find the defendant not guilty if at the time of the crime, the defendant was legally insane. A person is legally insane and not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.
>
> The defendant must prove his legal insanity by a preponderance of the evidence, that is evidence that has more convincing force and the greater probability of truth.

For the fourth case (that of the epileptic), the judge's instructions consisted of the legal test for *unconsciousness,* adapted from the standardized California judges' instruction manual (CALJIC). These instructions read as follows:

> You should find the defendant not guilty if at the time of the crime the defendant was unconscious as a result of epilepsy. A person is unconscious when there is no function of his conscious mind, even though he may appear to be conscious.

If the evidence raises a reasonable doubt whether he was in fact conscious, you should find that he was then unconscious.

Following the judge's instructions, the subject was asked to give a verdict of guilty or not guilty. In addition, subjects were asked to indicate their responses on a 40-point verdict scale with labels ranging from "Defendant should certainly be acquitted" to "Defendant should certainly be convicted."

After they had read the four cases and answered questions about them, subjects' qualification for service on capital juries was verified by asking them the death-qualification screening question and the question about their ability to be fair and impartial in capital cases once again. All subjects proved to have been correctly classified by the earlier screening. Finally, subjects were asked (1) "What percentage of the defendants who plead not guilty by reason of insanity *really are* insane?" and (2) "In general, how reliable is psychiatric testimony?" (on a 7-point scale).

The subjects were then paid and fully debriefed.

RESULTS

Verdicts

The main results are summarized in Table 1. It is clear that the subjects who would be excluded from jury service in capital cases are more likely than the

Table 1. Death-Qualified and Excludable Jurors' Perceptions of the Guilt of Defendants Pleading Not Guilty by Reason of Insanity[a]

	Death-qualified (%) (n = 19)	Excludable (%) (n = 16)	
	Organic cases		
Retardation			
Guilty verdict (% of Ss)	56	56	ns
Scaled verdict (mean)	21.6	18.5	ns
Psychomotor epilepsy			
Guilty verdict	37	50	ns
Scaled verdict	21.1	20.1	ns
	Nonorganic cases		
Schizophrenia (schizoaffective type)			
Guilty verdict	89	56	$\chi^2_{(1)} = 5.02$ $p = .025$
Scaled verdict	30.8	22.6	$t_{(26)} = 1.92$ $p = .07$
Schizophrenia (paranoid)			
Guilty verdict	84	56	$\chi^2_{(1)} = 3.33$ $p = .08$
Scaled verdict	31.9	22.7	$t_{(30)} = 2.73$ $p < .02$

[a]Scaled verdict scale ranges from 1 to 40, with 1 = "Defendant certainly should be acquitted," 20 = "Completely undecided," 40 = "Defendant certainly should be convicted." P values for t tests are two-tailed.

death-qualified subjects to vote for a verdict of "not guilty by reason of insanity" in the two cases involving schizophrenic defendants, and it is also clear that these differences disappear in the cases where the insanity defense is based on a physical disorder. In the two organic cases there are no significant differences between the subjects who are strongly opposed to capital punishment and those who are not. An inspection of the percentages voting for guilt, and of the scale means, indicates that these differences are primarily due to the hostility of the death-qualified subjects to the schizophrenic defendants. The subjects who would be excluded from capital juries due to their attitudes toward the death penalty tend to vote close to 50% for conviction in all four cases, and the verdicts of the death-qualified jurors are not significantly different from 50% in the two organic cases, perhaps a finding to be expected given the limited information available to our subjects. However, between 80% and 90% of the death-qualified subjects reject the insanity defense for the schizophrenics.

Other Measures

Almost none of the other 27 measures showed significant differences between the death-qualified and excludable subjects, although on 26 of them the excludable subjects were more favorable to the insanity defense. On all of the legal elements of insanity in all four cases the trend was for the excludable subjects to rate the presence of that element as more likely, with one exception. The exception was that the excludable subjects were less likely to believe that the epileptic's crime was a *result* of his epilepsy.

The excludable subjects were slightly (not significantly) more likely to believe the psychiatric testimony in all four cases, including that of the psychiatrist who testified for the prosecution in the retardation case. They also showed a nonsignificant tendency to rate psychiatric testimony in general as more believable.

Finally, there was a highly significant difference between the death-qualified and excludable jurors in response to the question, "In your estimation, what percentage of the defendants who plead not guilty by reason of insanity *really are* insane?" Those who are excluded from capital juries estimated, on the average, that 55.7% of those who plead insanity are "really" insane, while those who are permitted to serve were much more skeptical, estimating that only 30.9% are "really" insane ($t_{(27)} = 3.29$, $p < .003$).

DISCUSSION

Several lines of research converge on the present study. First, various survey researchers have discovered that attitudes toward the death penalty are an important predictor of more general clusters of attitudes representing the conflict between crime control and due process values (Vidmar and Ellsworth, 1974; Smith, 1976; Packer, 1968). Those who favor the death penalty are more likely to favor the point of view of the prosecution, to distrust the criminal defendant and his counsel, to take a punitive attitude toward criminals, and to be more

concerned with efficient crime control than with guarantees of due process. Those who oppose the death penalty, on the other hand, tend to be more concerned with mercy, more interested in maintaining due process guarantees, and less mistrustful of the defendant. These differences continue to be evident when we compare the groups whose attitudes against the death penalty are so adamant that they are excluded from service on capital juries with the group that is permitted to serve (the "death-qualified" jurors), whose attitudes range from strongly in favor of the death penalty to moderately opposed (Fitzgerald and Ellsworth, this issue). Simulation studies (Goldberg, 1970; Jurow, 1971; Cowan, Thompson, and Ellsworth, this issue) show that these attitudinal differences are reflected in subjects' behavior when they are asked to take the part of a juror and deliver a verdict.

These two groups have shown especially large differences in their responses to survey questions about insane defendants. Pro-death-penalty jurors have been much more likely than anti-death-penalty jurors to regard the insanity defense as a ruse and an impediment to the conviction of criminals. The present research demonstrates that these attitudinal differences are reflected in jurors' perceptions of the guilt or innocence of particular defendants who plead insanity. In the two cases involving schizophrenic defendants, nearly half of the excludable, anti-death-penalty jurors voted for acquittal, while nearly all of the death-qualified jurors voted for conviction.

However, our results also indicate that the pro-death-penalty jurors' refusal to accept the insanity defense clearly reflects their mistrust of the concept of a *mental* disorder as an excusing condition. In the two cases where the defense of insanity was based on a physical disease or defect, there were no differences between the death-qualified and excludable jurors. The distinction in the minds of the death-qualified jurors is striking. In part it may reflect the public's generally greater hostility towards the mentally ill than towards people with other types of disease or handicap, including mental retardation (Tringo, 1970), but in part it probably also reflects a particular resentment against the idea of a purely mental problem as an *excuse* for unacceptable behavior. To a person who believes strongly in crime control, who believes that people must be made to pay for their irresponsible behavior, it must be particularly galling to see one form of irresponsibility excused by another. A physical disorder may be seen as external to the person, creating a sort of necessity or duress, but a purely mental disorder may be seen as simply another manifestation of a weak or corrupted character.

Theoretical Implications

In one of the earliest and most extensive studies of jurors' attitudes and insanity defense, Simon resported that "three efforts were made to relate attitudes to verdict and each ended in failure" (1967, p. 129). This finding has frequently been cited in more recent works that claim that additional differences among jurors are not important predictors of their verdicts (Penrod, Note 2; Hastie, Penrod, and Pennington, in press). Our study adds a fourth effort to Simon's, and ends in success. We believe that the reason for this difference is that attitudes toward criminal justice are probably more important predictors of

verdicts in insanity defense cases than are the general attitudes toward the mentally ill measured by Simon. The problem may be less that those who convict lack sympathy for people who are mentally disturbed than that they fail to believe that the defendant really has anything wrong with him. Our death-qualified subjects estimate that only 31% of defendants who plead insane "really are" insane. Thus we believe that the relevant attitudes are those toward the insanity defense in particular, and toward criminal defendants and crime control in general, and not those toward mental illness in general.

As for the general predictive power of attitudes in juror decision making, the picture is too complicated to warrant general pronouncements of success or failure at this stage. In our two schizophrenia cases the proportions of death-qualified and excludable jurors who voted for conviction differed by 30 percentage points. In a much more realistic simulation study, this attitudinal variable has produced proportional differences nearly as large (Cowan, Thompson, and Ellsworth, this issue), and in general, death penalty attitudes have tended to emerge as significant predictors of verdict across a variety of studies. Attitudes toward the death penalty are the only general attitudes to form the basis of a blanket exclusion from jury service, and prosecutors are convinced enough of the correlation between death penalty attitudes and conviction proneness to avail themselves of death qualification whenever the opportunity arises.

This is not to say that legal practice is a criterion of truth, nor that we can predict an individual's verdict in a particular case with any confidence simply on the basis of his attitude toward the death penalty. In some cases the attitude will have relatively little impact, in some cases a great deal, in some cases none at all. In some cases—for example, capital cases involving the insanity defense—it may combine with other attitudes to create a very strong effect. The research to date suggests that in the long run, over many relevant cases, and especially in cases where the evidence for the defense and the prosecution is fairly evenly balanced, attitudes toward the death penalty have a predictable effect. Other attitudes, or combinations of attitudes, may have effects in other subsets of cases. The attitudes of powerful, influential jurors may account for more of the variance than the attitudes of more meek and passive jurors, both in their own and in others' verdicts. The general relationship between individual characteristics and verdicts undoubtedly exists, since most juries are split on the first ballot after having seen and heard the same evidence, and since first ballot votes are good predictors of final jury verdicts; however, the relationship is undoubtedly extremely complex. Given this state of affairs, it is clear that simplistic affirmations and simplistic denials of attitude–verdict relationships are out of place.

Legal Implications

In this study the general finding that death-qualified jurors are more likely to convict the defendant than are people who are excluded from serving on capital juries is extended to cases involving functional mental illness. Attitudinal surveys have indicated that insane defendants may be particularly subject to adverse discrimination due to the process of death qualification, since death-qualified

jurors are significantly more skeptical of the insanity defense than are people who are barred from jury service on the basis of their opposition to the death penalty. Our research shows that these attitudinal differences are reflected in consistent verdict differences in two hypothetical cases involving schizophrenic defendants. In these two cases, the process of death-qualification would have resulted in juries that would have been nearly unanimous for conviction on the first ballot.

Our sample included only jurors who said that they could be fair and impartial in deciding on guilt or innocence in a criminal case. The only basis for excluding any of the jurors in our sample from actual jury duty is their adamant opposition to the death penalty (there were no jurors in the sample who said that they would automatically vote *for* the death penalty). Our results show that jurors who are permitted to try capital cases are more likely to convict insane defendants than jurors representing the whole spectrum of capital punishment attitudes would be. In effect, the process of death-qualification undermines one of the most important defenses available to the mentally ill: the insanity defense.

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D-150

Exh. D

The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense[1]

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Three hundred venirepersons from the 12th Judicial Circuit in Florida completed a booklet of stimulus materials that contained the following: one question that specified participants' level of support for the death penalty; one *Witt* death-qualification question; a case scenario that included a summary of the guilt and penalty phases of a capital case; verdict and sentencing preferences; a 16-item measure that required participants to rate their receptiveness to the insanity defense on a 6-point Likert scale; and standard demographic questions. Results indicated that death-qualified venirepersons, when compared to excludables, were more likely to endorse certain insanity myths, find the defendant guilty, and sentence the defendant to death. Legal implications are discussed.

In the United States, the jury has a central role in capital trials. In all but a few states that retain capital punishment, the jury has the primary responsibility of pronouncing a sentence of either death or life in prison without the possibility of parole (*Ring v. Arizona*, 2002). This obligation is extremely unusual, considering the fact that it is not constitutionally mandated, and jury sentencing in non-capital trials is almost extinct (Hans, 1986). A primary difference between capital and non-capital trials is that jurors in capital trials must undergo an extremely controversial process called death qualification.

Death qualification is a part of voir dire during which prospective jurors are questioned regarding their beliefs about capital punishment. This process serves to eliminate jurors whose attitudes toward the death penalty would render them unable to be fair and impartial in deciding the fate of a defendant. In order to sit on a capital jury, a person must be willing to

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consider all legal penalties as appropriate forms of punishment. Jurors who pass the aforementioned standard are deemed *death-qualified* and are eligible for capital jury service; jurors who fail the aforementioned standard are deemed *excludable* or *scrupled* and are barred from hearing a death-penalty case. Two United States Supreme Court cases were pivotal in defining the standards for death-qualified and excludable jurors. In *Witherspoon v. Illinois* (1968), the Court ruled that death qualification could exclude

> ... only those potential jurors who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. (p. 522)

A major change in the standard for death qualification occurred in *Wainwright v. Witt* (1985). According to this ruling, in the opinion of the judge, if a potential juror feels so strongly about the death penalty that his or her belief would "prevent or substantially impair the performance of his duties as a juror, it is grounds for dismissal for cause" (p. 852).

Although the Court sought to enhance the fairness and impartiality of capital juries by utilizing the *Witt* standard, the data indicate that this modification did not have the intended effect. In fact, research has suggested that the adoption of the *Witt* standard has had significant consequences. For example, Dillehay and Sandys (1996) found that 28% of participants who met the *Witt* standard would, contrary to law, automatically impose the death penalty. In fact, 36% of all venirepersons exhibited attitudes toward the death penalty that were so vehement that it prevented them from being impartial in a capital case. In addition, Neises and Dillehay (1987) have found that *Witt* has excluded significantly more potential jurors (21%) than *Witherspoon* (14%), which has resulted in juries that are even less representative.

Death-qualification status, however defined, is more frequent in certain demographic and attitudinal subgroups than others. For example, significant numbers of women, Jews, Blacks, agnostics, atheists, Democrats, and people with low socioeconomic status are excluded from capital jury service (Fitzgerald & Ellsworth, 1984; Hans, 1986; Moran & Comfort, 1986; Robinson, 1993). In fact, jurors who pass the *Witt* standard tend to be demographically distinguishable: They are more likely to be male, White,

financially secure, Republican, and Catholic or Protestant (Hans, 1986). Also, when compared to excludable jurors, death-qualified jurors are more likely to

> ... trust prosecutors and distrust defense attorneys, consider inadmissible evidence even if a judge instructed them to ignore it, and infer guilt from a defendant's [failure to take the witness stand]. Death-qualified jurors are more hostile to psychological defenses such as schizophrenia. They tend to view prosecution witnesses as more believable, more credible, and more helpful. They are less likely to believe in the fallibility of the criminal justice process, and less likely to agree that even the worst criminals should be considered for mercy. (Hans, 1986, p. 152)

Death qualification also appears to have several biasing process effects. For example, Haney (1984b) argued that the experience of death qualification itself affects jurors' perceptions of both parts of a death-penalty case. Capital voir dire is the only voir dire that requires the penalty to be discussed before it is relevant. Thus, the focus of jurors' attention is drawn away from the presumption of innocence and onto post-conviction events. The time and energy spent by the court presents an implication of guilt and suggests to jurors that the penalty is pertinent, if not inevitable (Haney, Hurtado, & Vega, 1994). Death qualification also forces jurors to imagine themselves in the penalty-phase proceeding. Previous research has found that simply assuming an event will occur increases the subjective estimate that it will (Tversky & Kahneman, 1974).

In addition, during death qualification, jurors are questioned repeatedly about their views on the death penalty. This can have two negative effects. First, jurors can become desensitized to the imposition of the death penalty as a result of repeated exposure to this potentially emotional issue. Second, jurors are forced to publicly commit to a particular viewpoint. Earlier findings have suggested that public affirmation of an opinion actually can cause that opinion to strengthen (Festinger, 1957). Finally, jurors who do not endorse the death penalty also encounter implied legal disapproval by being "excluded" because they are "unfit for capital jury service."

A final United States Supreme Court case is critical in the discussion of death qualification. In *Lockhart v. McCree* (1986), the American Psychological Association (APA) submitted an amicus curiae brief to the Court summarizing the findings of a body of research on death qualification. In this brief, the APA posited that the data demonstrate that death-qualified juries are more pro-prosecution, pro-conviction, and less representative than are juries that are

not death-qualified and that death qualification should be abolished (Bersoff, 1987).

The Supreme Court reviewed the research and criticized the studies presented by the APA as having "serious flaws in the evidence upon which the courts below had concluded that 'death qualification' produces 'conviction-prone' juries" (*Lockhart v. McCree*, 1986, p. 1764). In essence, the Court ignored the weight of the data, the implications of convergent validity, and declared the data submitted by the APA to be inadequate and legally irrelevant, and ruled that the process of death qualification was, indeed, constitutional (Thompson, Cowan, Ellsworth, & Harington, 1989).

In spite of this ruling, the debate concerning the fairness of capital punishment continues and, in the past few years, has returned to the forefront of American consciousness with a vengeance. In 2003, former Governor George Ryan cited psycholegal research as one of the bases for his decision to issue blanket commutations for all inmates on Illinois' death row. Several other states have followed suit by either imposing moratoriums on the death penalty or refusing to execute juveniles or the mentally ill. In essence, death qualification is neither moot in law nor settled fact, as it appears that the courts are more willing than ever to consider empirical research when deciding the fairness of the ultimate punishment. Consequently, it is imperative that psycholegal researchers continue to investigate the issues that pertain to capital cases.

One area of research that is in need of exploration is death-qualified venirepersons' attitudes toward the insanity defense. While the percentage of defendants who plead not guilty by reason of insanity (NGRI) in capital cases is extremely small, the amount of controversy generated by this defense is enormous.

Presently, the United States utilizes two major legal standards of insanity. Approximately one third of the states (including Florida) employ the *McNaughton* rule (*Regina v. McNaughton*, 1843), which excuses criminal conduct if the defendant suffered from a mental illness at the time of the crime and (a) did not know what he or she was doing or (b) did not know that what he or she was doing was wrong. Approximately half of the states and all of the federal courts use the *Brawner* rule (*U.S. v. Brawner*, 1972), which was derived from the American Law Institute's (ALI) Model Penal Code. The *Brawner* (or ALI) rule states that the defendant is not responsible for his or her criminal behavior if, as a result of a mental illness, he or she lacks substantial capacity to either appreciate the criminality or wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law. Four states do not retain an insanity defense at all. All defendants are presumed sane. Consequently, it is up to the defense to prove insanity beyond a reasonable doubt in every state that utilizes the insanity defense.

Approximately one fourth of the states utilize the guilty but mentally ill (GBMI) jury instruction, which was developed in response to the great controversy surrounding the insanity defense. In the GBMI jury instruction, a defendant need only prove the presence of mental illness at the time of the offense. Although the GBMI jury instruction appears to be similar to the insanity defense, in reality the two are very different. Whereas the GBMI jury instruction hinges on the ability of the defense to prove that the defendant suffered from psychopathology at the time of the crime, a defendant pleading NGRI must prove both the presence of mental illness and substantial cognitive impairment.

The punishments for defendants found GBMI and NGRI are also extraordinarily different. Defendants found GBMI are remanded to a psychiatric hospital until it is deemed that they are no longer mentally ill. When this determination is made, they are sent to prison to serve out the remainder of their sentences. Defendants found NGRI never serve time in prison; rather, they are committed to a secure psychiatric facility until it is deemed that they are no longer a danger to society (Butler, in press).

While the vast majority of people view the insanity defense with great skepticism, research has found that death-qualified venirepersons are even less receptive to it than are their excludable counterparts (Cowan, Thompson, & Ellsworth, 1984; Ellsworth, Bukaty, Cowan, & Thompson, 1984; White, 1987). Consequently, the aforementioned research concluded that capital defendants who plead NGRI face a particularly difficult challenge: attempting to prove their innocence to a jury toward conviction and in favor of the death sentence before the trial even begins.

The vast majority of earlier research was conducted almost 20 years ago and utilized the now-defunct *Witherspoon* rule. It is imperative to investigate whether death qualification affects jurors' endorsements of the insanity defense when they are categorized under the current *Witt* standard. In addition, previous research relating to death qualification has asked venirepersons to classify their beliefs about the insanity defense without including a stimulus case vignette, guilt-phase arguments, penalty-phase arguments, or jury instructions. We felt that providing the aforementioned would enhance the external validity of the study.

There are two purposes to conducting the current study. First, we plan to replicate previous research by investigating the differences between death-qualified and excludable venirepersons' evaluations of the insanity defense under the more current *Witt* standard. Second, we plan to extend previous research through the utilization of a sample and methodology that are externally valid. Based on the findings of similar studies, it is hypothesized that death-qualified venirepersons, when compared to excludables, will be more likely to do the following: (a) convict the defendant; (b) sentence the

defendant to death; (c) have negative attitudes toward mental illness; (d) endorse insanity myths; and (e) be less receptive to legal standards of insanity.

Method

Participants

The study participants consisted of 300 venirepersons (female, 59%; male, 41%) who had been called for jury duty (via a random selection of driver's licenses) at the 12th Judicial Circuit in Sarasota, Florida. Participants' median age was 55 years, and the median income was $65,000.

The ethnic origin of the sample was as follows: 94% were White/Non-Hispanic; 2% were White/Hispanic; 1% was Black/Hispanic; 1% was Black; and 2% were of an ethnic origin other than what was specified on the questionnaire. One percent of respondents had some high school education; 22% had completed high school; 32% had some college or junior college; 24% had a college degree; and 21% had a postgraduate or professional degree.

Eighteen percent of the venirepersons had served on a jury before. A comparison reveals that the sample closely resembles the demographic breakdown of the 12th Judicial Circuit. Consequently, representativeness does not appear to be a pertinent issue.

Stimulus Case

First, venirepersons read the summary of testimony presented during the guilt phase of a capital trial involving the murder of the defendant's wife and children. The scenario was constructed with the assistance of an attorney experienced in capital cases that utilized the insanity defense. Specifically, the hypothetical case vignette depicted a man who called 911 after he had asphyxiated his wife, son, and daughter. After his arrest, police learned that the defendant had a long history of psychiatric disturbances and had killed his family because he felt that they deserved a better life. After participants read the evidence presented during the guilt phase, they were asked to select a verdict: (a) guilty; (b) not guilty; or (c) not guilty by reason of insanity.

Second, venirepersons who had convicted the defendant read the summary of arguments and testimony presented during the penalty phase of the aforementioned capital trial. Participants were then asked to specify their sentence preference: (a) death; or (b) life in prison without the possibility of parole. Finally, venirepersons read jury instructions for the concept of

reasonable doubt, the charge of first-degree premeditated murder, and the defense of insanity.

Predictor Variables

First, venirepersons specified their level of support for the death penalty. This was assessed in two ways. Participants were asked to circle the statement with which they agreed most: "The death penalty is never an appropriate punishment for the crime of first-degree murder"; "In principle, I am opposed to the death penalty, but I would consider it under certain circumstances"; "In principle, I favor the death penalty, but I would not consider it under certain circumstances"; and "The death penalty is the only appropriate punishment for the crime of first-degree murder."

Second, venirepersons were asked to indicate if they felt so strongly about the death penalty (either for it or against it) that their views would prevent or substantially impair the performance of their duties as a juror in a capital case. Participants who answered *No* to this question were classified as death-qualified, while those who answered *Yes* were classified as excludable.

Attitudes Toward the Insanity Defense

Sixteen items were constructed to assess attitudes toward the insanity defense (see Appendix). Venirepersons were asked to read each question and to indicate their opinion on a 6-point Likert scale ranging from 1 (*strongly disagree*) to 6 (*strongly agree*).

This measure is divided into three subscales. The first subscale contains three items that measure attitudes toward mental illness. Higher scores on the mental illness subscale are indicative of more negative attitudes toward psychopathology. The second subscale contains 10 questions that measure endorsements of insanity myths. Higher scores on the myths subscale are indicative of higher endorsements of insanity myths. The third subscale contains three items that assess knowledge of the legal standards of insanity. Higher scores on the legal standards subscale are indicative of higher endorsements of the legal standards of insanity.

Procedure

Permission to collect data at the courthouse was obtained from the Director of the Jury Pool, Janis Carrera, under the assumption that she had the opportunity to review the proposal before the research was undertaken.

After the proposal was approved, the data were collected during January 2003 through April 2003. Volunteers were solicited from an area designated for prospective venirepersons who had not been assigned to a particular case. Because the aforementioned venirepersons had not been selected for jury service and were free to go home, there was little concern that their participation in this study would impact any of the trials in progress.

Prior to their participation, venirepersons read an informed-consent form, which described the nature of the study, ensured that their participation was completely voluntary and anonymous, and reiterated that they would not receive compensation for their participation. Venirepersons also were given a contact number in case they were interested in the final results of the study once the data were collected and analyzed.

Participants then completed a booklet of measures. First, venirepersons responded to one question specifying participants' level of support for the death penalty and one *Witt* death-qualification question. Second, participants completed a list of 16 questions that assessed their attitudes toward the insanity defense. Third, venirepersons were asked to read the guilt phase of a capital case, a summary of the jury instructions, and choose a verdict (i.e., guilty, not guilty, or not guilty by reason of insanity). Fourth, if participants found the defendant guilty, they were instructed to read the penalty phase and select a sentence (i.e., death or life in prison without the possibility of parole). Finally, venirepersons answered standard demographic questions. The questionnaire took approximately 15 to 20 min to complete.

Results

Eight percent ($n = 25$) of participants felt that the death penalty is never an appropriate punishment for the crime of first-degree murder. Thirty-seven percent ($n = 112$) of participants opposed the death penalty, but would consider it under certain circumstances. Forty-three percent ($n = 129$) of participants favored the death penalty, but would not consider it under certain circumstances. Eleven percent ($n = 34$) of participants said that the death penalty is always an appropriate punishment for the crime of first-degree murder.

Twelve percent ($n = 37$) of participants felt so strongly about the death penalty that they said their views would prevent or substantially impair the performance of their duties as a juror in a capital case. Consequently, these venirepersons were classified as *Witt* excludables. Fourteen percent of women ($n = 25$) were excluded based on their beliefs about the death penalty, whereas 10% of men ($n = 12$) were excluded based on their beliefs about the death penalty.

Sixty-six percent ($n = 197$) of venirepersons found the defendant guilty. One percent ($n = 6$) of venirepersons found the defendant not guilty. Thirty-three percent ($n = 99$) of venirepersons found the defendant NGRI.

Sixty-seven percent ($n = 175$) of death-qualified venirepersons found the defendant guilty. Two percent ($n = 6$) of death-qualified venirepersons found the defendant not guilty. Thirty-one percent ($n = 82$) of death-qualified venirepersons found the defendant NGRI. Sixty percent ($n = 22$) of excludable venirepersons found the defendant guilty. None of the excludable venirepersons found the defendant not guilty. Forty percent ($n = 15$) of excludable venirepersons found the defendant NGRI.

The distribution of sentence also showed no evidence of ceiling or floor effects. Of the participants who convicted the defendant of the murders of his wife and children, 28% ($n = 55$) of venirepersons recommended the death penalty, while 72% ($n = 142$) suggested a sentence of life in prison without the possibility of parole. Of the participants who convicted the defendant, 29% ($n = 51$) of the death-qualified venirepersons elected to sentence the defendant to death, whereas 71% ($n = 124$) of the death-qualified venirepersons voted to sentence the defendant to life in prison without the possibility of parole. Of the participants who convicted the defendant, 18% ($n = 4$) of the excludables elected to sentence the defendant to death, whereas 82% ($n = 18$) of the excludables voted to sentence the defendant to life in prison without the possibility of parole.

The aforementioned distributions of verdict and sentence were statistically significant. A chi square reveals a significant effect of death qualification on verdict, $\chi^2(2) = 182.54$, $p < .001$. Death-qualified venirepersons, as opposed to excludables, were more likely to find the defendant guilty. Another chi square shows a significant effect of death qualification on sentence, $\chi^2(2) = 39.62$, $p < .001$. Death-qualified venirepersons, as opposed to excludables, were more likely to sentence the defendant to death.

A MANOVA reveals a significant effect of death qualification on participants' attitudes toward mental illness, endorsements of insanity myths, and knowledge of legal standards of insanity, $F(16, 283) = 2.07$, $p = .01$, $\eta^2 = .07$. Univariate tests demonstrate that death-qualified venirepersons, as opposed to excludables, were more likely to endorse three insanity myths: that the insanity defense is used on a frequent basis, $F(1, 298) = 12.72$, $p < .001$, $\eta^2 = .04$; that the insanity defense is a "legal loophole," $F(1, 298) = 8.92$, $p = .003$, $\eta^2 = .03$; and that if a person is found NGRI, he or she is released immediately back into society, $F(1, 298) = 6.71$, $p = .01$, $\eta^2 = .02$. Univariate tests do not reveal a significant effect of death qualification on knowledge of legal standards of insanity or attitudes toward mental illness.

Discussion

This study clearly demonstrates a relationship between death qualification and attitudes toward the insanity defense. As hypothesized, death-qualified participants were more likely to convict the defendant. Also as predicted, death-qualified venirepersons who had found the defendant guilty were more likely to sentence the defendant to death.

In addition, death-qualified venirepersons were more likely to endorse certain insanity myths: that the insanity defense is used on a frequent basis; that the insanity defense is a "legal loophole"; and that if a person is found NGRI, he or she is released immediately back into society. This finding may be because certain venirepersons may be more familiar with the aforementioned myths, as opposed to other myths that might require more specialized knowledge of the law (e.g., it's easy to "fake" insanity; insanity is a medical, not a legal term; in order to be found NGRI, a person must have a documented history of mental illness).

One surprising finding is that death qualification had a minimal impact on participants' knowledge of legal standards of insanity. It is noteworthy that venirepersons do not lend much weight to the legal standards that separate sane defendants from insane defendants. Another unexpected result is that death qualification had a negligible effect on participants' attitudes toward mental illness. It appears that all venirepersons, regardless of their attitudes toward the death penalty, are similarly skeptical of defenses involving psychopathology (Butler, in press).

However, the current study is not without its methodological limitations. First, this study was largely correlational in nature, as it would have been impossible to assign participants randomly into categories of *death-qualified* and *excludable*. Consequently, causation cannot be inferred.

In addition, questions on a written survey measuring venirepersons' beliefs about the death penalty and classifying venirepersons as death-qualified or excludable (which were answered confidentially and anonymously) have limited external validity. During the voir dire conducted in an actual trial, prospective jurors are questioned both verbally and in front of other jurors. Defense attorneys often try to rehabilitate excludable jurors who express opposition to the death penalty, rather than allow them to be dismissed immediately for cause. However, it is the judge, as opposed to the juror, who makes the final decision as to whether a prospective juror is death-qualified or excludable.

Also, venirepersons were predominantly Caucasian, older, politically conservative, and of higher socioeconomic status. While the sample was representative of the 12th Judicial Circuit in Florida, it may not be representative of other jurisdictions. In addition, having participants read a

summary of the guilty and penalty phases of a capital trial can hardly be generalized to the experiences of jurors who experience a death penalty trial in vivo. All cases utilizing the insanity defense are unique; thus, it would be impossible to conclude that the facts presented in this case are representative of all cases involving an insanity defense. Finally, deliberations (a salient part of any trial) were not included in this study.

In spite of the aforementioned issues, the results of this study may have broad legal implications. The present findings replicate earlier research concluding that the process of death qualification results in the seating of differentially partial jurors (Butler & Moran, 2002; Diamond, 1993; Luginbuhl, 1992; Lynch & Haney, 2000; Wiener, Prichard, & Weston, 1995). In addition, the current study extends previous findings by demonstrating the devastating effect that death qualification, combined with preexisting attitudes toward the insanity defense, has on capital defendants who plead NGRI.

So, what are we to do? The U.S. Supreme Court has concluded definitively that the death-qualification process is constitutional (*Lockhart v. McCree*, 1986). However, psycholegal research continues to suggest otherwise. Even more importantly, some courts are beginning to listen. In the most pronounced stance against capital punishment made by a Supreme Court Justice since the late Harry Blackmun's 1994 statement that he would "no longer tinker with the machinery of death," Supreme Court Justice John Paul Stevens recently told a convention of attorneys and judges that the United States "would be much better off if we did not have capital punishment."

As long as the United States continues to utilize the death penalty, it is reasonable to conclude that the government has a legitimate interest in having jurors who are able and willing to impose the ultimate punishment. However, it appears that this guarantee may substantially impair capital defendants' right to due process (Luginbuhl & Middendorf, 1988).

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Appendix

Strongly Disagree 1 2 3 4 5 6 Strongly Agree
Note. (L) = legal standard; (M) = myth; (MI) = mental illness.

1. If a person is unable to appreciate the wrongfulness of his or her conduct, then he or she should be found not guilty by reason of insanity (NGRI). (LS)
2. The insanity defense is used on a frequent basis. (M)
3. The insanity defense is a "legal loophole." (M)
4. If a person is unable to control his or her conduct, then he or she should be found not guilty by reason of insanity (NGRI). (LS)
5. If a person is found not guilty by reason of insanity (NGRI), he or she is immediately released back into society. (M)
6. The insanity defense leads to acquittals in the majority of cases in which it is used. (M)
7. If a person suffers from a mental disease or defect that substantially impairs his or her capacity to either appreciate the wrongfulness of their

conduct or to control his or her conduct, they should be found not guilty by reason of insanity (NGRI). (LS)

8. Most mental illnesses are within a person's control. (MI)
9. Many defendants "fake" insanity to escape punishment. (M)
10. It's easy to "fake" insanity. (M)
11. Insanity is a medical, not a legal, term. (M)
12. Most serial killers, mass murders, and spree killers plead not guilty by reason of insanity (NGRI). (M)
13. Psychiatrists and psychologists who testify in insanity trials are simply "hired guns" (i.e., they will say anything if paid enough money). (M)
14. If a person suffers from a mental disease or defect, it is usually his or her own fault. (MI)
15. Mentally ill people usually look crazy. (MI)
16. In order to be found not guilty by reason of insanity (NGRI), a person must have a documented history of mental illness. (M)